

No. 87-746-ASX  
Status: GRANTED

Title: Michael H. and Victoria D., Appellants  
v.  
Gerald D.

Docketed:  
October 28, 1987

Court: Court of Appeal of California,  
Second Appellate District

Counsel for appellant: Shear, Leslie Ellen, Boraks, Robert A.  
W.

Counsel for appellee: Dearing, Gerald, Hoffman, Larry,  
Schwartz, Glen H.

NOTE\* Notice of Appeal 10/28

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1987	G	Statement as to jurisdiction filed.
2	Nov 27 1987		Appendix of appellant Michael H. and Victoria D. filed.
3	Dec 9 1987		DISTRIBUTED. January 8, 1988
4	Dec 30 1987	F	Response requested -- JPS.
6	Jan 27 1988		Motion of appellee Gerald D. to dismiss or affirm filed.
7	Feb 10 1988		REDISTRIBUTED. February 26, 1988
8	Feb 29 1988		PROBABLE JURISDICTION NOTED. *****
10	Mar 10 1988		Order extending time to file brief of appellant on the merits until May 5, 1988.
11	May 4 1988	G	Motion of National Council for Children's Rights, Inc. for leave to file a brief as amicus curiae filed.
12	May 5 1988		Joint appendix filed.
13	May 5 1988		Brief of appellant Michael H. filed.
14	May 5 1988	G	Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae filed.
15	May 5 1988		Brief of appellant Victoria D. (TBP) filed.
16	May 5 1988	G	Motion of appellant Victoria D. for leave to proceed further herein in forma pauperis filed.
17	May 16 1988		DISTRIBUTED. May 19, 1988. (Motion of appellant Victoria D. for leave to proceed in forma pauperis).
18	May 17 1988		Record filed.
		*	Certified copy of original record, box, received.
22	May 21 1988	D	Motion of appellee for divided argument filed.
19	May 23 1988		Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae GRANTED.
20	May 23 1988		Motion of National Council for Children's Rights, Inc. for leave to file a brief as amicus curiae GRANTED.
21	May 23 1988		Motion of appellant Victoria D. for leave to proceed further herein in forma pauperis GRANTED.
23	Jun 1 1988		Brief of appellant Victoria D. filed.
25	Jun 7 1988		Brief of appellee Gerald D. filed.
24	Jun 13 1988		Motion of appellee for divided argument DENIED.
26	Jun 23 1988		CIRCULATED.
27	Jul 11 1988	X	Reply brief of appellant Victoria D. filed.
28	Jul 11 1988	X	Reply brief of appellant Michael H. filed.
29	Jul 15 1988		Set for argument. Tuesday, October 11, 1988. (2nd case) (1 hr.)

No. 87-746-ASX

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

30	Oct 11 1988		ARGUED.
----	-------------	--	---------

87 746

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

JCT 28 1987

JOSEPH F. SPANIOL, JR.  
CLERK

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

OCTOBER TERM, 1987

**MICHAEL H.,**

*Plaintiff, Cross-Defendant, and Appellant,*

*and,*

**VICTORIA D., a minor by and through her  
Guardian Ad Litem, Leslie Shear,**

*Defendant, Cross-Complainant, and Appellant,*

*vs.*

**GERALD D.,**

*Defendant, Cross-Defendant, and Appellee.*

**JURISDICTIONAL STATEMENT**

**NEWMAN, AARONSON, KREKORIAN & VANAMAN  
VALERIE VANAMAN**

14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

*Counsel for Appellants*

October 28, 1987

## QUESTION PRESENTED

Whether it is a deprivation of the Due Process Clause and/or the Equal Protection Clause under the 14th Amendment to the United States Constitution for a state to create a conclusive statutory presumption regarding the paternity of a child based on the marital status of the mother at the time of birth and apply it to terminate an on-going father-child relationship without an evidentiary hearing as to biological paternity or the best interests of the minor child notwithstanding clear and convincing scientific evidence and the mother's acknowledgement of the putative father's paternity on the basis of which the putative father had volunteered both the emotional and financial responsibility of fatherhood.

## TOPICAL INDEX

Question Presented .....	i
Table of Authorities .....	iii
Jurisdictional Statement .....	1
Opinions Below .....	2
Jurisdiction .....	2
Constitutional Provisions and Statutes .....	2
Raising the Federal Question .....	10
Statement of the Case .....	11
The Question is Substantial .....	14
Conclusion .....	26
Appendix A	
Notice of Appeal .....	A1
Appendix B	
Opinion of the Court of Appeal of the State of California .....	B1

## TABLE OF AUTHORITIES

	Page
Cases	
Caban v. Mohammed, 441 u.S. 380 (1979) .....	15
Evans v. U.S., 707 F.2d 582, at 602 (1983) .....	24
Gomez v. Perez, 409 U.S. 535 (1973) .....	23
In re B.G., 11 Cal.3d 679, 692, F.N. 8 (1974) .....	26
Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981) .....	17
Lehr v. Robinson, 463 U.S. 248 (1983) .....	16
Levy v. Louisiana, 391 U.S. 68 (1968) .....	23
Michele W. v. Ronald W., 39 Cal.3d 354 (1985) .....	17, 20
Quillion v. Walcott, 434 U.S. 246, 255 (1978) .....	15
R. McG. v. J. W., 615 P.2d 666 (Colo. 1980) .....	24
Santosky v. Kramer, 455 U.S. 745, 755, 758-59 (1982) .....	17
Stanley v. Illinois, 405 U.S. 645 (1971) .....	15, 23
Smith v. Organization of Foster Families, 431 U. S. 816, 845 (1977) .....	15

Vlandis v. Kline, 412 U.S. 441, 446, 448-52 (1973) .....	23
---	----

### Statutes

California Civil Code	
Section 7001 .....	4, 18, 22
Section 7002 .....	4, 18, 22
Section 7003 .....	4
Section 7004 .....	5, 7, 8, 18
Section 7006 .....	7
Section 7008 .....	9
Section 7010 .....	9
California Evidence Code	
Section 621 .....	passim
Colorado Revised Statutes 1973	
Section 19-6-107 .....	24
28 U.S.C.	
Section 1257(2) .....	2
Section 2403(b) .....	2

### Constitutions

United States Constitution	
Amendment XIV .....	passim

### Miscellaneous

Bartletts, <i>Rethinking Parenthood as an Exclusive Status: The Need For Legal Alternatives When the Premise of the Nuclear Family Has Failed</i> , 70 Virg. L. R. 879, 919-927, 945-951, 955-958, 961 (1984) .....	15
---	----

Comment, California's Conclusive Presumption of Legitimacy: Its Legal Effect and Its Questionable Constitutionality, 35 S.Cal.L.Rev. 437, 439 (1962) .....	22
Comment, California's Conclusive Presumption of Legitimacy: Jackson. Jackson and Evidence Code Section 621, 19 Hastings L. J. 963, 194 (1968) .....	22
Comment, Cutchember v. Payne: Approaching Perfection in Paternity Testing, 34 Cath. U. L. Rev. 227 (1984) .....	23

**In the  
Supreme Court  
of the United States**

OCTOBER TERM, 1987

**MICHAEL H.,**

*Plaintiff, Cross-Defendant, and Appellant,*

*and*

**VICTORIA D.,**

*a minor by and through her Guardian*

*Ad Litem, Leslie Shear,*

*Defendant, Cross-Complainant, and Appellant,*

*vs.*

**GERALD D.,**

*Defendant, Cross-Defendant, and Appellee.*

**JURISDICTIONAL STATEMENT**

Michael H. and Victoria D., the appellants, appeal from the denial of Appellant's petition for review by the Supreme Court of California, dated July 30, 1987. The denial of review by the Supreme Court finalized the Judgment of the Court of Appeal which held that section 621 of the California Evidence Code, on its face, and as applied in this case, does not violate appellant's rights to due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. Appellants submit this jurisdictional statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is reported at 191 Cal.App.3d 995. It is reprinted in the appendix hereto, *infra*.

## JURISDICTION

The Judgment of the Supreme Court of California, denying appellant's petition for review, was filed on July 30, 1987.

A notice of appeal to this Court was duly filed in the Court of Appeal, 2d District, Division Three, of California on October 28, 1987.

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The provisions of 28 U.S.C. section 2403(b) may be applicable.

## CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code Section 621:

(a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the

consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

California Civil Code Section 7001:

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

California Civil Code Section 7002:

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Civil Code Section 7003:

The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

California Civil Code Section 7004:

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

#### California Civil Code Section 7006:

(a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004:

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services the mother or the personal representative or a parent of the

mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

California Civil Code Section 7008:

The Child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If he is a minor and a party to the action he shall be represented by a guardian ad litem appointed by the court. The natural mother, each man presumed to be the father under Section 7004, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in subdivision (f) of Section 7010 and an opportunity to be heard. The court may align the parties.

(a) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes except for actions brought pursuant to Section 270 of the Penal Code.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued as prescribed in Article 6 (commencing with Section 10450) of Chapter 8, of Division 9 of the Health and Safety Code.

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(d) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts.

### RAISING THE FEDERAL QUESTION

In response to a Motion for Summary Judgment, filed by Appellee after the trial court had ordered a psychological evaluation from which all the parties agreed to a continuation of visitation, the appellants raised the claim that California Evidence Code Section 621 is unconstitutional as repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Summary judgment was granted by the Superior Court in favor of appellee.

The due process and equal protection challenges were made again on appeal to the Court of Appeal of the State of California, Second Appellate District, Division Three. The Court of Appeal expressly

considered and rejected appellant's constitutional claims and affirmed the Judgment of the Superior Court. See opinion, *infra*.

The constitutional claims were reiterated by appellants before the California Supreme Court in the Petition for Hearing. The Supreme Court denied appellant's petition for review on July 30, 1987.

### STATEMENT OF THE CASE

In around October, 1980, Michael H. and Carole D. were having an affair. As a result of their sexual union, Victoria D. was conceived. On May 11, 1981, Victoria D. was born one month premature. At the time Carole D. was married to Gerald D.

On November 18, 1982, Michael H. brought this action to establish paternity. His action was premised upon (i) a blood (HLA) Human Leucocyte Antigen tissue typing test voluntarily taken by Carole D., Victoria D. and Michael H. on October 29, 1981, performed by the University of California at Los Angeles, the results of which showed a 98.07 percent probability that Michael H. is Victoria D.'s biological father; (ii) Carole D., after becoming estranged from Gerald D., took Victoria D. and moved to the Virgin Islands in January, 1982, to live with Michael H. in a familial relationship until March, 1982; (iii) Michael H. was aware that due to a genetic defect for which he was a potential carrier and transmitter, Victoria D. required specific knowledge concerning her biologic parentage; (iv) From April, 1982 until November, 1982, Carole D. lived for periods of time with a new boyfriend, S.K. in California, with Gerald D. in New

York and Europe and had sporadic contact with Michael H. When it became certain that Carole D. was not going to acknowledge Michael H. as Victoria D.'s biological father, Michael H. filed his paternity action. See opinion, *infra*.

From August 1983 until April 1984, Carole D. and Victoria D. again lived with Michael H. during another period of Carole D.'s estrangement from Gerald D., and during which time Carole D. acknowledged Michael H. as Victoria D.'s father and Victoria D. called Michael H. "Daddy". See opinion, *infra*.

In March of 1984, shortly before Carole D. left Michael H., she signed a Stipulation<sup>1</sup> as did Michael H. acknowledging that Michael H. was Victoria D.'s father. However, when she left Michael H., she instructed her attorney not to file the Stipulation in court. See opinion, *infra*.

Thereafter in June 1984, Michael H. and the Guardian Ad Litem for Victoria sought visitation rights for Michael H. Temporary visitation rights were granted and in effect until October 13, 1987 when a new order superceded it. The trial court appointed an expert to test and evaluate Michael H., Victoria D.,

---

<sup>1</sup> The Stipulation aside from acknowledging Michael H.'s paternity also:

- (A) Determined his current and on-going financial obligation for support.
- (B) Contained his agreement to make Victoria D. his sole heir to his estate.
- (C) Provided for continuing visitation rights for him and,
- (D) Provided that Gerald D. could be recognized as Victoria D.'s step-father and have contact with her if he so desired.

Carole D. and Gerald D., who had resumed a marital relationship with Carole D. and who intervened in around September 1984. Based upon the expert's report<sup>2</sup> in October 1984, the parties (Michael H., Carole D., Gerald D. and guardian ad litem for Victoria D.) stipulated to a 3-year unsupervised visitation schedule to begin in November 1984 between Michael H. and Victoria D. which the trial court entered as an Order of the Court on October 23, 1984.

---

<sup>2</sup> The expert made the following findings:

- (A) Victoria D. is positively attached to all three parent figures, *principally and equally*, Michael H. and Carole D.
- (B) . . . we believe it is important for Victoria D. that he (Michael H.) be permitted to remain a member of her family . . . because we perceive Michael H. as the single adult in Victoria D.'s life most committed to caring for her needs on a long-term basis . . . .
- (C) We believe it is beneficial to Victoria D. that she be permitted to maintain a relationship with Michael H. . . . it would be unnecessarily hurtful to deprive her of his affection and intellectual stimulation . . . .
- (D) . . . nevertheless, the interaction observations clearly indicate that a strong positive mutual attachment exists between Victoria D. and Michael H. despite Carole D.'s reference to him in front of Victoria D. as Michael . . . Victoria D. still, on occasion, refers to him as Daddy and on every occasion relates to Michael H. with warmth and comfort.

Based on those findings, the court-appointed expert recommended that Michael H. be recognized as a legal parent of Victoria D. and provided for continuing unsupervised visitation according to a specific three-year schedule with extra provisions for visits on her birthday and Christmas, telephone and mail communications between visits and the continuance of child support obligations, monitored by the court.

Thereafter Gerald D. filed a Motion for Summary Judgment which was opposed by Michael H. and Victoria D.'s Guardian Ad Litem on Constitutional due process and equal protection grounds. The trial court granted Gerald D.'s Motion for Summary Judgment on January 28, 1985,<sup>3</sup> dismissing Michael H.'s Petition for Declaration of Paternity and Guardian Ad Litem's Declaration of a parent-child relationship without any evidentiary hearing on any issue.

At each stage of the appellate process,<sup>4</sup> appellants have reiterated their constitutional challenge to wit, that by reason of a conclusive presumption, California Evidence Code Section 621, appellants have been denied an opportunity to an evidentiary hearing concerning the underlying issues of biological paternity, their right to a continuing relationship and the best interests of the child and such is a deprivation of appellants' equal protection and due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

### THE QUESTION IS SUBSTANTIAL

The mainstay of every society throughout history has been the development of the child as a prospective member of that society. The psychological needs of

---

<sup>3</sup> On this date the trial court also terminated the prior agreed upon three-year visitation schedule.

<sup>4</sup> On appeal, amicus curiae briefs were filed by The American Civil Liberties Union (A.C.L.U.) in support of Michael H.'s position and the National Council for Children's Rights (N.C.C.R.) in support of Victoria D.'s position.

children and their relationship to their parents have been considered and discussed extensively by professionals in the field including anthropologists, psychologists, sociologists, clergymen, and educators. As in all manner of human affairs, when disputes have arisen concerning rights and obligations flowing from the parent-child relationship, the legal system has been called upon to arbitrate and is expected to provide an equitable resolution to the problem.

In response, legislators and judges, operating at times outside their area of expertise, have endeavored to provide rules and procedures designed to further the perceived interests of society.

In establishing "parental rights," our legal system has with rare exceptions, looked upon the nuclear-biological family for its notion of equitable results, and consequently, the rights and obligations imposed have been imprisoned in constructs surrounding the legal recognition of a "parent". This juridic response at some point becomes overloaded when confronted with rights of foster parents, stepparents, adoptive parents, surrogate mothers, putative fathers and their relationship rights to children which appear to involve an ongoing parent-child familial relationship. See Bartlett, *Rethinking Parenthood, The Need For Legal Alternatives When The Premise Of The Nuclear Family Has Failed*, (1984), 70 Virg. L. R. 879.

On several occasions this Court has been called upon to address the question of who is entitled to legal recognition of a parent-child relationship. *Stanley v. Illinois*, 405 U.S. 645 (1971); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380

(1979); *Lehr v. Robinson*, 463 U.S. 248 (1983). The instant case presents a novel question concerning constitutional protection of the parent-child relationship. This question should be resolved against the backdrop of concepts enunciated by this Court as to the fundamental rights involved. Indeed, the California courts have recognized what the authorities from this Court have held on this subject:

The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect . . . .'

The court has frequently emphasized the importance of the family. *The rights to conceive and to raise one's children have been deemed 'essential.'* *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and [*r*]ights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). *It is cardinal with us that custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the due process clause of the Fourth Amendment, *Meyer v. Nebraska*, *supra*, at 399, [and] the

equal protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra*, 405 U.S. 645, 649, 658 (1972) [emphasis added], quoted in *In re Kelvin M.*, *supra*, 77 Cal.App.3d at 400-401.

Here the putative father is being prevented from establishing his parental status where the consequence is the effective termination of what had been an ongoing father-daughter relationship, in the absence of any evidentiary findings and where the evidence pertinent to such findings suggested that the termination was contrary to the best interests of the child. *Michele W. v. Ronald W.*, 39 Cal.3d 354 (1985), *Santosky v. Kramer*, 455 U.S. 745, 755, 758-59 (1982), *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). This untoward result is based on no consideration other than the marital status of the mother, that is her having been married to a man who was not the putative father at the time of the child's birth.

Legislative action in California has resulted in a confusing and sometimes contradictory statutory scheme which bears no relationship to the policy interests originally determined to support a conclusive presumption of paternity. The determination of paternity is now governed by Evidence Code section 621 and California's version of the Uniform Parentage Act codified in Civil Code sections 7000-7021. The Uniform Parentage Act, adopted by California in 1975, governs paternity proceedings defining the parent child relationship, specifying who may bring an action to determine the existence or nonexistence of such a relationship, and establishing rebuttable presumptions affecting the burden of proof. At the time the Act was

adopted, Evidence Code section 621 was expressly retained despite the fact that its provisions conflicted with aspects of the uniform act.

Under Civil Code section 7001, the parent child relationship is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Civil Code section 7002 provides that: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Evidence Code section 621 conflicts with these provisions in that it recognizes the mother's husband as the child's "father" and prevents the natural father from establishing a legal parent child relationship.

Evidence Code section 621 is also contrary to the provisions found in Civil Code section 7004. Civil Code section 7004 establishes presumptions of paternity based upon a man's relationship to the child. Subsection (a)(1) of the section repeats the presumption based upon marriage; however, the presumption is of equal weight with other presumptions based upon psychological relationships. All presumptions within the section may be rebutted by clear and convincing evidence, and conflicting presumptions are resolved in favor of the presumption "which on the facts is founded on the weightier considerations of public policy and logic."

The rational basis of these provisions stands in stark contrast to the seemingly irrational limitations imposed by section 621. Evidence Code section 621 operates to conclusively determine a child's paternity based solely on the marital status of the mother without regard to

biological truth or the best interests of the parties involved. The rebuttable presumptions of the Uniform Parentage Act permit a legal determination of paternity which takes these factors into account. The presumption of paternity contained in section 621 needlessly imposes restriction on the establishment of a legal parent child relationship between a biological parent and child.

The primary rationale given by the California Courts, viz., concern for the integrity of the nuclear family, does not justify the harsh result produced in this case. While it may be the laudable intention of the California legislature to support the nuclear family as an institution, Section 621 is not a rational device for doing so. This is because the application of Section 621 is capable of producing too many anomalous results, some of which not only fail to promote the nuclear family as an institution, but in fact work against it.

For example, under Section 621 the child's natural mother and her husband have full power to seek to establish paternity in someone other than the husband, despite the fact that such an act could be more disruptive to a family than any claim by an outsider. In addition, in the instant case had Carole D. and Gerald D. married after Victoria D. was born and maintained a nuclear family including the child,<sup>5</sup> Section 621 would have no affect on a claim by Michael H. or any other third person to be the child's natural father. On the other hand, if Carole D. and Gerald D. had divorced one month after Victoria D. was born and

---

<sup>5</sup> Perhaps based on Carole's representation that Gerald was the father of her child conceived out of wedlock.

Carole D. and Michael H. married two years later and lived with Victoria D. as a nuclear family, Section 621 would permit Gerald D. to defeat any effort by Michael H. to establish himself as Victoria D.'s biological father. *Michele W. v. Ronald W., supra.*

In reality in the instant case it does not appear that the effort by Michael H. to preserve his relationship with his biological child is a critical factor affecting the viability of the family unit consisting of Carole D., Gerald D., and Victoria D., anymore than would be the case if Michael H. were a divorced former husband of Carole D.'s. In fact, the critical element on which the family unit of Carole D., Gerald D., and Victoria D. seems to depend is Carole D.'s choice of a male companion. Michael H.'s rights and Victoria D.'s interest should not be determined with reference to the continued existence of Carole D.'s., marriage to Gerald D., particularly in light of what the record below revealed as to the instability of that relationship. The real issue in this case is whether, if Section 621 compels the perverse result that the facts here demonstrate, it passed Constitutional muster.

What actually happened to the parties in this case under the auspices of a statute purporting to protect a great American institution should not be ignored. When Carole D. decided that she wished to be with Michael H. rather than Gerald D. she acknowledged Michael H. as the father of Victoria D. and the three of them lived as a family. Consequently, a parental bond was developed between Michael H. and Victoria D. that was stronger than and not dependant on any continuing relationship between Michael H. and Carole D. When Carole D. tired of Michael H. and decided to

resume her relationship with her theretofore estranged husband Gerald D., she wielded the sword of Section 621 to sever the parent-child relationship between Michael H. and Victoria D. that Carole D.'s previous actions, when she deemed it in her interests, had helped to foster. What Seciton 621 has done in this case has nothing to do with the institution of the family. The application of Section 621 has had no more lofty consequence than to facilitate the desire of a woman to maniuplate her environment. At the bottom end, Michael H.'s and Victoria D.'s ~~mutual~~ love now has no outlet for its expression, and Victoria D.'s interest in the benefits derived from a caring, committed parent, albeit not a custodial parent, is denigrated.

The Court below also purported to justify its decision on Victoria D.'s interest in not being branded a child of an adulterous relationship. It should be noted, however, that this hypothesized interest of Victoria D. is far from absolute. It could have been overcome at the whim of the mother's husband. It could have been overcome by the concerted action of the mother and the biological father who was not the husband. It could have been overcome if the marriage ended after conception but before birth. What the Court below ruled, however, was that the child's interest in presumed legitimacy could not, under any circumstances, be overcome or outweighed by her interest in the benefits of a continuing parent-child relationship with Michael H., not necessarily to the exclusion of a continuing parent-child relationship with Gerald D.

In any event, Victoria D.'s interest in her status of legitimacy, while arguably substantial, has to be weighed against both her interests in knowledge of her

lineage,<sup>6</sup> her interest in maintaining an important attachment with Michael H. and Michael H.'s interest in being acknowledged as her father and not being deprived of all contact with her.

While the state interest in protecting children from the stigma of illegitimacy is well recognized, the trend is away from doing so through the device of conclusive presumptions. See Comment, California's Conclusive Presumption of Legitimacy: *Jackson v. Jackson* and Evidence Code Section 621, 19 Hastings L. J. 963, 194 (1968), Comment, California's Conclusive Presumption of Legitimacy: Its legal Effect and Its Questionable Constitutionality," 35 S. Cal. L. Rev. 437, 439 (1962).

One alternative approach which has in fact been adopted in California is simply to eliminate "legitimacy" as a concept having legal significance.

California has by statute abolished the distinction between legitimate and illegitimate children. See California Civil Code sections 7001 and 7002. Even if this policy consideration had continued validity today, section 621 is not tailored to further it. The section permits a husband to establish that he is not the child's

---

<sup>6</sup> This knowledge has particular importance under the peculiar facts of this case. Michael H. is a carrier of a genetic syndrome called Laurence-Moon-Beidl (LBD) which can produce severe retardation and developmental disabilities in the offspring of a union of two carriers. His son, William Darrow, from a prior marriage was born with severe developmental disabilities as a consequence of LBD. Victoria D. may be a carrier and so might her issue. The seriousness of that possibility is an added reason entitling Victoria D. to know the truth as to who her biological father is.

father while denying the natural father the opportunity to establish he is the child's father.

Policy considerations which may once have justified a conclusive presumption of paternity based upon marriage have lost considerable vitality as a result of cultural and scientific changes over the years.<sup>7</sup> Attempting to respond to these changes legislators have amended statutes involving these presumptions to render them rebuttable under certain situations.

The Court in *Gomez v. Perez*, 409 U.S. 535 (1973) and *Levy v. Louisiana*, 391 U.S. 68 (1968) has eliminated any significant distinctions based on the legitimacy of children.

The use by the states of Conclusive Presumptions as a means of fashioning social policy has been called into serious question by this Court. In *Vlandis v. Kline* 412 U.S. 441, 446, 448-452 (1973), this Court expressed the view that Conclusive Presumptions were Constitutionally suspect where (1) the presumed facts are not universally true; (2) reasonable alternative means exist to determine actual facts; and (3) the presumption affects an important right or one enjoying Constitutionally protected status. *Id.* at 452.

While the Conclusive presumption of Section 621 is not directed toward a resolution of a factual issue, but instead seeks to establish a substantive legal principle this distinction does not cure, and if anything exacerbates the constitutional defect. As this Court said in *Stanley v. Illinois, supra*, procedure by presumption is permissible, but only when it does not

---

<sup>7</sup> See Comment, *Cutchember v. Payne: Approaching Perfection in Paternity Testing*, 34 Cath.U.L.Rev. 227 (1984).

foreclose the determinative issues in a way which tramples upon the constitutional rights of natural fathers and their children.

The decisions of the California Courts upholding the conclusive presumption of Section 621 against Constitutional attack are at odds with a decision by a Colorado court striking down, as violative of the Equal Protection Clause of the Fourteenth Amendment, a substantially similar provision, *R.Mc.G. v. J.W.*, 615 P.2d 666 (Colo. 1980) (Striking down section 19-6-107 of C.R.S. 1973 (1978 Repl. Vol 8))

Where interests of critical Constitutional importance are involved, such as the rights of a parent to be recognized as such or the right of a child to a relationship with a parent, the protections afforded should not vary diametrically from state to state.

As stated in *Evans v. U.S.* 707 F.2d 582, at 602 (1983), "Rights of the sort asserted by the Plaintiff's are not absolute (termination of a parent-child relationship) when incompatible with sufficiently potent public interest they must give way . . . severance of the relationship between a parent and his child will survive constitutional scrutiny only if form requirements are met (a) the asserted governmental interest must be compelling; (b) there must be a particularized showing that the state interest in question would be promoted by terminating the relationship; (c) it must be impossible to achieve the goal in question through any means less restrictive of the rights of parent and child; and the affected parties must be accorded to procedural protections mandated by the due process clauses."

California Evidence Code Section 621 is not tailored to legitimate state interests with the necessary precision. There are alternative means available which could accomplish the professed objective, without interfering with existing bonds that the state should protect, not terminate. For example, the state could employ a rebuttable presumption which established a strong preference for the recognition of the mother's husband as the legal father of the child. This would still leave room, however, for a putative biological father to establish, in an evidentiary hearing, that circumstances existed justifying a deviation from the presumption. Such circumstances would include; (1) Acknowledgement by the mother of his paternity; (2) The assumption of parental responsibility; (3) The existence of a defacto<sup>8</sup> psychological parental relationship; (4) Clear and convincing evidence of biological paternity and; (5) The best interests of the child.

In sum, the fundamental constitutional deficiencies of Section 621 are as follows: It deprives a putative biological father of Due Process of law by defeating a fundamental interest through the device of a conclusive presumption. It deprives a putative father of the Equal Protection of the law through an invidious, gender-based discrimination. Whenever a married woman has sex with a man other than her husband and

---

<sup>8</sup> De facto parent as a concept is recognized in California as a substantial one which plays a significant role in our society deserving of legal protection. What this means is to refer to that person who, on a day-to-day basis, assumes the role of parent seeking to fulfill both the child's physical needs and his psychological need for affection and care. *In re B.G.*, 11 Cal.3d at p. 692, Fn. 8 (1974)

a child is born of that extramarital sexual union, the female participant has the right to circumvent the so-called conclusive presumption, but the male participant does not.<sup>9</sup>

In the present case section 621 operates to intervene, sever and terminate an already recognized existing parent-child relationship.

### CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

DATED: October 28, 1987

Respectfully submitted,

**NEWMAN, AARONSON,  
KREKORIAN & VANAMAN**

**VALERIE VANAMAN**

14001 Ventura Boulevard  
Sherman Oaks, California 91423  
*Counsel for Appellant*

---

<sup>9</sup> Ironically, the same statute invidiously discriminates against women with respect to the marital relationship. While the male spouse can seek to circumvent the so-called conclusive presumption unilaterally, the female spouse can do so only if the putative biological non-spouse father is willing to acknowledge paternity in an affidavit.

## **APPENDIX A**

### **Notice of Appeal**

—A1—

Received for filing in  
Clerk's Office  
Court of Appeal  
Second Appellate District

OCT 28 1987

APPENDIX A

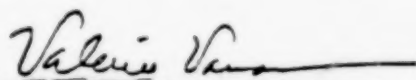
IN THE  
UNITED STATES SUPREME COURT

MICHAEL H.,	)	COURT OF APPEAL
	)	2d DISTRICT
<i>Plaintiff,</i>	)	DIVISION THREE
<i>Cross-defendant,</i>	)	CASE NO.
<i>and Appellant,</i>	)	B015384
	)	S001251
<i>and</i>	)	
	)	
VICTORIA D., a minor by	)	SUPERIOR
and through her	)	COURT NO.
Guardian Ad Litem,	)	CF022753
Leslie Shear,	)	
	)	
<i>Defendant,</i>	)	
<i>Cross-complainant,</i>	)	
<i>and Appellant,</i>	)	
	)	
vs.	)	
	)	
GERALD D.,	)	
	)	
<i>Defendant,</i>	)	
<i>Cross-defendant,</i>	)	
<i>and Appellee.</i>	)	
	)	

**NOTICE OF APPEAL  
TO THE SUPREME COURT  
OF THE UNITED STATES**

Notice is hereby given that MICHAEL H. and VICTORIA D., the Appellants above named, hereby appeal to the Supreme Court of the United States from an order denying review after judgment by the Court of Appeal rendered by the Supreme Court of the State of California, entered in this action on July 30, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

A handwritten signature in cursive script, reading "Valerie Vanaman", is written over a horizontal line.

**VALERIE VANAMAN**  
Counsel for Appellants

## **APPENDIX B**

**Opinion of the Court of Appeal  
of the State of California**

APPENDIX B

OPINION OF THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

MICHAEL H. v. GERALD D.  
191 Cal.App.3d 995; — Cal.Rptr. — [Apr. 1987]

---

[Nos. B015384, B018241. Second Dist., Div. Three.  
May 7, 1987]

MICHAEL H., PLAINTIFF,  
Cross-defendant and Appellant, v.  
GERALD D.,  
Defendant, Cross-defendant and Respondent;  
VICTORIA D.,  
a Minor, etc., Defendant, Cross-complainant and  
Appellant.

---

COUNSEL

Newman, Aaronson, Krekorian, Vanaman and Joel  
Aaronson for Plaintiff, Cross-defendant and  
Appellant.

Paul Hoffman, Gary Williams and Patricia Erickson  
as Amici Curiae on behalf of Plaintiff, Cross-  
defendant and Respondent. (For A.C.L.U.)

Shear & Kushner, Leslie Ellen Shear and Elliot Kushner for Defendant, Cross-complainant, and Appellant.

Michael Louis Oddenino as Amicus Curiae on behalf of Defendant, Cross-complainant and Appellant. (For N.C.C.R.)

Larry Hoffman and Glen H. Schwartz for Defendant, Cross-defendant and Respondent.

---

## OPINION

ARABIAN, J. —

### INTRODUCTION

Plaintiff, cross-defendant and appellant Michael H. brought this reverse paternity action against defendant, cross-defendant and respondent, Gerald D.; his wife, defendant and cross-defendant, Carole D.; and defendant, cross-complainant and appellant Victoria D.; to establish that he is Victoria D.'s biological father and to establish a father/child relationship with her. The trial court appointed a guardian ad litem/attorney to represent Victoria D.'s interests in the action and she filed a cross-complaint to establish a legal or de facto/psychological parent-child relationship with Gerald D. and/or Michael H. Gerald D. moved for summary judgment on the first amended complaint and the cross-complaint on the ground that there were no triable issues of fact regarding application of the conclusive presumption of Evidence Code section 621, subdivision (a), that the issue of a married woman cohabiting with her husband, who is not impotent or

sterile, is a child of that marriage. The trial court granted the motion and Michael H. and Victoria D. separately appealed.<sup>1</sup>

## FACTS

Carole D. and Gerald D. were married and commenced living together as husband and wife on May 9, 1976. While still married and living together as husband and wife, Carole conceived and, on May 11, 1981, gave birth to Victoria D. Carole D. had an extra-marital affair with Michael H. during the period the parties agree Carole D. conceived Victoria D.

After Victoria D. was born, Carole D. told Michael H. she believed the child could be his. On October 29, 1981, Carole D., Michael H. and Victoria D. had blood tests performed at the University of California at Los Angeles. Those tests show that there is a 98.07 percent probability that Michael H. is Victoria D.'s biological father. Carole D. separated from Gerald D. in October of 1981, and Gerald D. left Los Angeles for New York City where he had obtained employment. Thereafter, Carole D. and Victoria D. went to live with Michael H. in St. Thomas. They lived with him for three months, from January of 1982 to March of 1982.

---

<sup>1</sup> The judgment in this case was filed on October 22, 1985. The notices of appeal of Michael H. and Victoria D. were prematurely filed following the trial court's order granting the summary judgment. Rule 2(c), of the California Rules of Court, provides in pertinent part; "A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry." Therefore, we have determined the premature notices of appeal are valid. (See 9 Witkin, Cal. Procedure (3d ed. 1985). Appeal, § 412, pp. 410-411.)

Carole D. and Victoria D. returned to Los Angeles after leaving Michael H. They visited Gerald D. in New York one month in the spring of 1982, one month in the summer of 1982, and then went with him to Europe for three weeks in the fall of 1982. Thereafter, Carole D. and Gerald D. decided to reconcile.

On November 18, 1982, Michael H. brought the instant action.

In March of 1983 through July of 1983, Carole D. and Victoria D. lived with Gerald D. in New York. Carole D. and Victoria D. returned to Los Angeles in July, and in August of 1983, they again took up residence with Michael H. They lived with Michael H. until April of 1984, and during this time Carole D. acknowledged Michael H. as Victoria D.'s father and Victoria D. called him "daddy."

In March of 1984, shortly before Carole D. left Michael H., she signed a stipulation acknowledging that Michael H. was Victoria D.'s father. However, when she left Michael H., she instructed her attorney not to file the stipulation in court. In June of 1984, Carole D. and Gerald D. again reconciled.

Thereafter, both Michael H. and Victoria D., through her guardian ad litem/attorney, sought visitation rights for Michael H. pendente lite.<sup>2</sup>

To assist the court in making appropriate visitation orders, Dr. Norman Stone was appointed to test and evaluate Michael H., Victoria D., Carole D., and Gerald D. In his evaluation report, Dr. Stone recommended that Michael H.'s interaction with

---

<sup>2</sup> During many of the periods when Michael H. and Carole D. were separated, Michael H. sent Carole D. money to support herself and Victoria D.

Victoria D. be strictly limited and that he not be assigned major caretaking responsibilities, even to the extent of a "standard" visitation schedule, because of the potential harm to Victoria D. However, Dr. Stone recommended that Michael H. be permitted to remain "a member of her family," because he perceived Michael H. "as the single adult in Victoria's life most committed to caring for her needs on a long-term basis."

Dr. Stone's evaluation of Michael H. indicated that Michael H.'s personality has failed to bring him the close relationship he seeks, leading him to feel victimized, and that those feelings exacerbate his sympathy-eliciting and aggressive pursuit of relationships, establishing a potentially endless cycle. While Dr. Stone found no evidence of any inappropriate sexual contact between Michael H. and Victoria D., he observed that Michael H. "exhibits virtually all of the characteristics associated with parents who engage in incestuous-type relationships."

Dr. Stone concluded that Carole D. was child-like and had a limited capacity to be intimate or self-sacrificing to the degree which normally characterizes relationships between parents and children and between spouses. Gerald D. was found to be a kind and intelligent man who has a real attachment to both Carole D. and Victoria D. and who clearly demonstrates the capacity to be a fine parent.

Based on Dr. Stone's report, in October of 1984, the parties stipulated to a visitation schedule. It was filed by order of the court on October 13, 1984. This plan was followed until the court granted Gerald D.'s motion for summary judgment on January 28, 1985,

with respect to the first amended complaint and the cross-complaint.

Carole D. and Gerald D. are still married and living with Victoria D. (and their new two-month old baby boy) at this time.

### CONTENTIONS

Michael H. contends:

I. "The presumption in Evidence Code section 621 should apply to promote the best interests of the child.

II. "The actions of [Carole D. and Gerald D.] constitute an equitable bar to the application of section 621."

Victoria D. contends:

I. "The trial court erred in dismissing without trial that portion of the Victoria's cross-complaint which sought to preserve the psychological parent and child relationship between Victoria and Michael, and to establish visitation rights under Civil Code section 4601."

II. "Application of Evidence Code section 621 to terminate the relationship between Victoria and Michael deprived Victoria of her rights under the due process and equal protection provisions of the United States and California Constitutions to maintain a relationship with a biological parent with whom she had established a psychological relationship."

III. "The motion for summary judgment was premature, in that discovery was incomplete and had been thwarted by the refusal of Carole and Gerald to answer questions propounded at their depositions."

IV. "Triable issues of fact existed as to the issues of cohabitation, stability, custody/visitation, support, attorneys fees, and the existence of psychological parent-child relationship as well as the facts necessary to determine whether Evidence Code [section] 621 might be constitutionally applied."

V. "Gerald and Carole were estopped from denying that Michael had a legal, biological, and psychological relationship with Victoria."

VI. "Gerald's failure to timely file a separate statement of material facts required defeat of his motion for summary judgment."

### DISCUSSION

#### I. *Standard of Review*

(1) "Inasmuch as this case reaches this court on appeal from a summary judgment in favor of the defendant [and cross-defendant Gerald D.], it is only necessary for us to determine whether there is any possibility [Michael H. and Victoria D.] may be able to establish [their] case[s]. (*Tresemmer v. Barke* (1978) 86 Cal.App.3d 656, 661-662 [150 Cal.Rptr. 384, 12 A.L.R.4th 27]; *Frazier, Dame, Doherty, Parrish and Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 Cal.App.3d 331, 338-339 [138 Cal.Rptr. 670].) (2) Summary judgment is properly granted where the evidence in support of the moving party conclusively negates a necessary element of the plaintiff's case or establishes a complete defense and thus demonstrates that under no hypothesis whatever is there a material factual issue which requires the process of a trial. (*Ibid.*; accord, *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 362 [178 Cal.Rptr.

783, 636 P.2d 1121].) . . . 'The purpose of the summary procedure is to penetrate through evasive language and, adept pleadings and ascertain the existence or absence of triable issues.' (*Chern v. Bank of America* [1976] 15 Cal.3d [866,] 873 [127 Cal.Rptr. 110, 544 P.2d 1310].)" (*Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 850 [200 Cal.Rptr. 674].)

II. *The Trial Court Did Not Err in Denying the Request of Victoria D. That the Summary Judgment Motion Be Denied for Procedural Irregularity.*

(3) Victoria D. contends that the trial court erred in granting the summary judgment motion because Gerald D. failed to timely file his statement of material facts.

Code of Civil Procedure section 437c, subdivision (b), requires a party moving for summary judgment to include in his papers supporting the motion a statement of the facts he contends are undisputed and provides the failure to comply with said requirement "may in the court's discretion constitute a sufficient ground for denial of the motion." (Italics added.) Subdivision (a) of that statute further provides that the moving papers, including the separate statement, be served, if service is by mail, not less than 33 days (28 + 5) before the hearing.

Gerald D. did not file and serve a separate statement when he filed and served his motion for summary judgment on October 9, 1984. The motion, originally set for hearing on November 16, 1984, was continued, first to January 14, 1985, and then to January 28, 1985, when the motion was heard. Gerald D.'s statement was served by mail on December 21, 1984. Thus, Gerald D.'s statement was served 38 days before January 28, 1985, when the motion was actually heard. That being

so, we cannot say that appellants were prejudiced or that the trial court abused its discretion by refusing to deny the summary judgment motion on the ground the statement was filed late.

III. *The Summary Judgment Was Not Prematurely Granted.*

(4a) Victoria D. contends the trial court erred in reaching the merits of the summary judgment motion, in failing to order a continuance, and in failing to grant her motion to compel discovery, which was heard at the same time as the motion for summary judgment. Victoria D. asserts that discovery was incomplete, having been thwarted by the refusal of Carole D. and Gerald D. to answer questions at their depositions which their attorneys deemed irrelevant to these proceedings.

Victoria D. cites to former Code of Civil Procedure section 437c, subdivision (h), which, when the summary judgment was granted, provided: "If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as may be just."<sup>3</sup>

Victoria D. argues that under *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354 [216 Cal.Rptr. 748, 703 P.2d. 88], app. diss. (1986) \_\_\_\_U.S.\_\_\_\_[88 L.Ed.2d 754, 106 S.Ct. 774], the section 621 presumption is rebuttable and that she was entitled, before the summary judgment was granted, to discover facts which

---

<sup>3</sup> The present version of the statute was effective January 1, 1987 (Stats. 1986, ch. 540, § 3).

transcended the preliminary facts of marriage, cohabitation and sterility/nonsterility. She argues also that she should have been allowed to discover facts behind the bare assertions of Gerald D. and Carole D. that he is not sterile nor impotent and that they cohabited during the relevant period. For example, Victoria D. believes she should have been able to inquire into what Carole D. and Gerald D. meant when they said they enjoyed "regular" sexual relations, since they did not specify the frequency. Victoria D. would also like to discover their business and medical records to ascertain exactly when they were together and the exact date of conception. Victoria D. asserts further that triable issues remain regarding the existence of a de facto parent-child relationship with Michael H., since she sought care, supervision and rights of inheritance from both Michael H. and Gerald D.

In granting the motion for summary judgment, the court necessarily found that Carole D. and Gerald D. were married and cohabitating and that Gerald D. was neither impotent nor sterile when Victoria D. was conceived and born. Thus, it denied as irrelevant after summary judgment Victoria D.'s concurrent motion to compel answers to questions propounded at the deposition of Carole D. and Gerald D. (Code Civ. Proc., § 2034, subd. (a)), to compel Carole D.'s further deposition in Los Angeles (Code Civ. Proc., § 2019, subd. (b)(2)) and for an award of her attorneys' fees and costs incurred in taking the original depositions of Carole D. and Gerald D.

We find that there were no triable issues that pertained to the preliminary facts which must be established to invoke the conclusive presumption of section 621.

(5) "The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. (*Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657].) In addition, the rule protects the innocent child from the social stigma of illegitimacy. (*In re Marriage of B.* (1981) 124 Cal.App.3d 524, 529-530 [174 Cal.Rptr. 429].) Although the Uniform Parentage Act, adopted in California in 1975 (Civ. Code, § 7000 et seq.), attempts to remove the legal effect of illegitimacy, the Legislature nevertheless retained the conclusive presumption of Evidence Code section 621, in contrast to the other presumptions under the act, which are rebuttable. (Civ. Code, § 7004, subds. (a), (b); 7 Pacific L.J. (1976) 411, 412; Note (1976) 28 Hastings L.J. 191, 207.)" (*Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623 [179 Cal.Rptr. 9], app. dismiss. (1982) 459 U.S. 807 [74 L.Ed.2d 45, 103 S.Ct.31].)

(4b) The parties do not dispute the fact that Carole D. and Gerald D. were married during the relevant time periods and the affidavits of Carole D. and Gerald D. establish that fact. Further, the statements of Carole D. and Gerald D. in their respective affidavits are sufficient to establish that they cohabited during the relevant time period and that Gerald D. was not sterile nor impotent.

Specifically, in her affidavit, Carole D. states that she and Gerald D. resided together continuously, from the date of their marriage, May 9, 1976, until October of 1981, except for intermittent periods when they were

apart for reasons pertaining to their respective careers. In his deposition, Gerald D. testified that he lived in Playa del Rey, California, from 1976 until 1981, during which time he maintained no other residence and maintained no telephone other than the one at his Playa del Rey residence and that when Carole D. was out of town for work assignments, he traveled to visit her at the place where she was working. These facts are not contradicted.

The affidavits of Carole D. and Gerald D. establish, and no one disputes that, Victoria D. was conceived in September of 1980. Even the affidavits of Michael H. in opposition to the summary judgment motion establishes that Carole D. and Gerald D. were cohabitating at that time. Michael H. relates that he came to Los Angeles in June of 1980 when Gerald D. was leaving the city and that he saw Carole D. on a regular basis during July, August, and September of that year "[e]ven when Gerald, Carole's husband, was in Los Angeles . . . ." (*Italics added.*)

Both Carole D. and Gerald D. stated in their affidavits that they engaged in sexual intercourse regularly throughout their marriage. These facts are sufficient to establish cohabitation. (See *Vincent B. v. Joan R.*, *supra*, 126 Cal.App.3d at p. 623.) The statements of Michael H. in his affidavit, that Carole D. told him that she and Gerald D. were using separate bedrooms and that they were no longer having sexual intercourse, does not create a triable issue of fact. "Cohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is irrelevant." (*Ibid.*)

Gerald D. declared in his affidavit: "I am not now, nor have I ever been, impotent or sterile. In addition to

the pregnancy which gave birth to Victoria, on two previous occasions I impregnated Carole: The first pregnancy terminated by miscarriage and the second by therapeutic abortion." In the affidavit of Carole D., she stated that she has never known Gerald D. to be impotent and had no knowledge that he is sterile. She also confirmed that she has twice before conceived a child as a result of intercourse with Gerald D. Those statements by Gerald D. and Carole D. are sufficient to establish that Gerald D. is not impotent nor sterile. (See *Vincent B. v. Joan R.*, *supra*, 126 Cal.App.3d at pp. 623-624.) The statement of Michael H. in his affidavit, that Carole D. told him that she had never been pregnant as a result of sexual intercourse with Gerald D., does not change that result. Even assuming Carole D. made such a statement, nothing in the statement suggests that sterility is the reason she was never impregnated by Gerald D. (*Id.*, at p. 624.) Michael H. has the burden in these circumstances to prove that Gerald D. is sterile or impotent. (*Ibid.*) He has failed to meet that burden.

Thus, there are no triable issues of fact as to the usual preliminary facts required for application of the conclusive presumption of section 621.

There is also no merit to Victoria D.'s assertion that the court should have deferred ruling on the summary judgment until blood tests could be taken of Carole D., Gerald D., and Victoria D. Blood tests are only admissible to contradict the conclusive presumption under circumstances not here relevant. (See Evid. Code, § 621, subs. (b), (c), (d).)

Further, as we discuss under sections IV, V, and VI of this opinion, *infra*, there were no relevant triable issues of fact on which the court required further

evidence to determine (1) whether, under the circumstances of this particular case, the conclusive presumption of section 621 is limited and (2) whether Michael H. is entitled to a de facto/psychological parent-child relationship with Victoria D.<sup>4</sup>

Thus, it follows that the trial court did not act prematurely in reaching the merits of the summary judgment motion, as Victoria D. contends. However, the court did err in prematurely concluding the proceedings without allowing Victoria D. to establish her claim for attorneys' fees and costs set forth in her concurrent motion which was denied as being irrelevant after the summary judgment. Upon remand, the court may issue a separate order in this regard.

IV. *Neither Michael H. Nor Victoria D. Were Deprived of Their Constitutional Rights by the Application of Section 621 Under the Circumstances of This Particular Case.*

Victoria D. and Michael H. separately contend that application of section 621 to terminate their relationship deprived them of rights under the United States and California Constitutions. They correctly assert that in *Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d 354, the California Supreme Court left open the validity of section 621 as applied to a situation where the state is preventing the establishment of a relationship between a putative father and child. (*Id.*, at p. 362, fn. 4.)

As did the putative father and daughter in *Michelle W.*, Michael H. and Victoria D. assert alternative grounds for holding section 621 unconstitutional. First,

<sup>4</sup> The parties agreed at oral argument that no evidence other than that which appears in this record on appeal is necessary to make these determinations.

they assert that section 621 prevents them from establishing the biological parent-child relationship in a court of law, thus depriving them of a liberty interest protected by the due process clause. Second, amicus curiae for Victoria D., National Council for Children's Rights, Inc., also makes the equal protection argument that the statute allows mothers and presumed fathers to rebut the presumptions of legitimacy (Evid. Code, § 621, subds. (b), (c), (d)), but denies Victoria D. the same opportunity.

A. *Due Process Claims.*

(6) The issue whether section 621 adequately protects a putative father's interests "must be resolved by weighing the competing private and state interests." (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 360; *In re Lisa R.* (1975) 13 Cal.3d 636, 648 [119 Cal.Rptr. 475, 532 P.2d 123, 90 A.L.R.3d 1017], cert. den. (1975) 421 U.S. 1014 [44 L.Ed.2d 682, 95 S.Ct. 2421], reh'g. den. (1975) 423 U.S. 885 [46 L.Ed.2d 116, 96 S.Ct. 159].)

Likewise, we must apply a balancing test to determine whether the child is denied due process by operation of section 621. (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 363; see *Estate of Cornelious* (1984) 35 Cal.3d 461, 467 [198 Cal.Rptr. 543, 674 P.2d 245], app. dism. (1984) 466 U.S. 967 [80 L.Ed.2d 812, 104 S.Ct. 2337].)

*Michael H.*

(7) While the interest of Michael H. in establishing that he is the biological parent of Victoria D. may be substantial, the interest of Michael H. is outweighed by the state's interest in upholding the integrity of the family (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p.

362; *Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]), and in protecting the child's welfare (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 362; compare *In re Lisa R.*, *supra*, 13 Cal.3d at pp. 649-650).

We appreciate that Michael H. has shown an interest in Victoria D. almost since her birth, has established an affectionate relationship with her and has at times even contributed to her support. However, the state's interest in preserving the integrity of the matrimonial family is so significant that it outweighs most other interests. (*Kusior v. Silver*, *supra*, 54 Cal.2d at p. 619 ["there are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned"].)

In *Stanley v. Illinois* (1971) 405 U.S. 645 [31 L.Ed. 2d 551, 92 S.Ct. 1208], and *In re Lisa R.*, *supra*, 13 Cal.3d 636, there was also a state-threatened termination of a developed parent-child relationship. The difference between those cases and this case, however, is clear. "In both *Stanley* and *Lisa R.*, the putative fathers were seeking to establish their legal relationship with children who otherwise had no parents and were wards of the state." (*Estate of Cornelious*, *supra*, 35 Cal.3d at p. 466; see *Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 362; *Vincent B. v. Joan R.*, *supra*, 126 Cal.App.3d at pp. 624-626.) Here, Gerald D. and Carole D. are now living together with Victoria D. and their new baby boy as a family unit. The state's interest in maintaining that family is considerable.

Moreover, there are competing private interests in this case which were not present in *Stanley* and *Lisa R.* Carole D. and Gerald D., who have custody of Victoria

D., oppose this action and do not desire that Victoria D. have contact with Michael H.

On this record, the significant interest of the state in protecting the welfare of Victoria D. is best served by upholding the conclusive presumption that Gerald D. is her legal father. (See *Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 362; cf. *In re Lisa R.*, *supra*, 13 Cal.3d at pp. 649-650).

We hold Michael H.'s "private interest in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child." (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 363.) Thus, with respect to Michael H., the application of section 621 to this case comports with the requirement of due process of law.

#### Victoria D.

(8) The interest of Victoria D. in a legal determination of who her biological father is, under the particular circumstances of this case, is also outweighed by the state's interests, described, *supra*. (See *Estate of Cornelious*, *supra*, 35 Cal.3d 461.)

Section 621 does not purport to factually determine the biological paternity of a child (*Kusior v. Silver*, *supra*, 54 Cal.2d at p. 619) nor do the actions of judges create or sever genetic bonds (*Lehr v. Robertson* (1983) 463 U.S. 248 [77 L.Ed.2d 614, 103 S.Ct. 2985]). (See *Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at pp. 362-363.)

The state has an "interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and

emotional strength and stability.” (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 363.)

Given the fact that Victoria D. has a legal father and that he and Carole D., Victoria D.’s mother, oppose the attempt of Michael H. to have himself declared her biological father, the welfare of Victoria D. would be harmed, not protected if she were permitted to rebut the conclusive presumption of legitimacy.

Moreover, notwithstanding this state’s adoption of the Uniform Parentage Act, which rendered illegitimacy to be without any legal effect (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 362, fn. 5), this resolution protects Victoria D. “against the social stigma of being branded a child of an adulterous relationship” (*Vincent B. v. Joan R.*, *supra*, 126 Cal.App.3d at p. 626).

Therefore, Victoria D. was not denied due process by the application of section 621 in this particular case.

#### B. Equal Protection Claim.

(9) The argument of amicus curiae for Victoria D., that section 621 allows mothers and presumed fathers to rebut the presumption of legitimacy, but denies the presumed legitimate child the same opportunity, must also fail. In *Michelle W.*, the California Supreme Court’s most recent decision in this area, it declared: “[W]e have declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child. Rather, we have applied the balancing test analysis of *Lisa R.* and *Estate of Cornelious.*” (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 365, italics added.)

V. Gerald D. Is Not Estopped From Asserting the Conclusive Presumption of Section 621.

(10a) Michael H. and Victoria D. assert that Carole D., and thereby Gerald D., should be estopped from barring Michael H.’s claim of paternity with section 621. We disagree.

That statutory scheme allows the use of blood test evidence to rebut the conclusive presumption of section 621 (subd. (b)), but only within two years from the child’s date of birth (subds. (c), (d)) and only by (1) the husband (subd. (c)) or (2) by the mother if the child’s biological father has filed an affidavit with the court acknowledging paternity of the child (subd. (d)).

Evidence Code section 623 provides: “Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.”

(11) “The essence of an estoppel, if it is applicable at all in these circumstances, is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury.” (*In re Lisa R.*, *supra*, 13 Cal.3d at p. 645; *El Rio Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 194 [213, P.2d 1] cert. den. (1950) 340 U.S. 850 [95 L.Ed. 623, 71 S.Ct. 77].)

(10b) The estoppel claims of Michael H. and Victoria D. are based on the following facts: that their blood tests showing the probable paternity of Michael H. were performed less than six months after the birth of Victoria D.; that Michael H. filed this action acknowledging paternity when Victoria D. was just one and one-half years old; that counsel of Carole D. filed for a summary adjudication in May of 1983, but then

took the matter off calendar when Carole D. resumed living with Michael H., holding him out as the father of Victoria D.; that just before the two-year period expired, Carole D. executed a stipulation for judgment declaring Michael H. to be the father of Victoria D., but then instructed her counsel not to file it in court; that Gerald D. acquiesced in the paternity of Michael H. inasmuch as he did not join in the instant action until 1984 although he was earlier served with summons; and that Carole D. participated in the maintenance of a father-daughter relationship between Victoria D. and Michael H.

While these facts may all be true, they do not demonstrate that Carole D. induced Michael H. "to his detriment to act in any manner he would not otherwise have acted in these proceedings." (*In re Lisa R.*, *supra*, 13 Cal.3d at p. 645.)

The fact remains that under the statutory scheme Michael H. could not act *alone* to rebut the conclusive presumption of section 621. That section (subd. (d)) requires the putative father and the mother to act *together within* two years to overcome the presumption. "[T]he plain word of the statute indicates that the rights of the natural married mother and the natural unwed father are conditioned upon each other." (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d at p. 365.)

Plainly, Carole D. found difficulty in resisting the pressure of Michael H. to assist him in his pursuit of a judicial declaration of his paternity. That she did each time fail to take the final critical step is not evidence that she nor Gerald D. should not be estopped from barring the quest of Michael H. for legal parenthood with the conclusive presumption of section 621.

Simply put, Michael H. could do nothing different in this action without the cooperation of Carole D. no matter how she or Gerald D. behaved and no matter what they said or did. In fact, any delay Michael H. endured in pressing his claim served to enhance not prejudice his case, since it was based in great part on his assertion that Victoria D. had come to know and love him over the years.

VI. *The Trial Court Did Not Err in Failing to Hold That Michael H. Is the De Facto/Psychological Parent of Victoria D. or That Michael H. Is Entitled to Visitation Rights.*

(12) Victoria D. contends that trial court erred in dismissing without trial that portion of the cross-complaint of Victoria D. which sought to preserve the de facto/psychological relationship between Victoria D. and Michael H. and to establish visitation rights pursuant to the second sentence of Civil Code section 4601.<sup>5</sup>

In her cross-complaint, Victoria D. sought a declaration of her rights regarding Michael H. and Gerald D. and claimed she had either a legal or a de facto/psychological relationship with both of them and was entitled to "care, supervision, support and rights of inheritance" from such de facto father. In his complaint, Michael H. also sought reasonable visitation rights with Victoria D.

---

<sup>5</sup> Civil Code section 4601 provides: "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to *any other person having an interest in the welfare of the child.*" (Italics added.)

The trial court had earlier granted Michael H. visitation rights pendente lite pursuant to section 4601, but those rights terminated when the court invoked the conclusive presumption of section 621 and granted summary judgment in favor of Gerald D.

First, we note there is no support for the proposition that the law recognizes both a legal, or de jure, and a de facto father of the same child. The case upon which Victoria D. relies, *Guardianship of Philip B.* (1983) 139 Cal.App.3d 407 [188 Cal.Rptr. 781], is inapposite. *Philip B.* involved a custody dispute over a child afflicted with Down's Syndrome waged by his parents against the child's court-appointed guardians who had developed a deep relationship with the child over a long period of time. The court described the guardians as "de facto parents" in explaining why an award of custody to the natural parents, rather than to the guardians, would be detrimental to the child.

In the case at bar, there is no hint that Carole D. and Gerald D. should be deprived of the custody of Victoria D. *Philip B.* has nothing whatsoever to do with the contention that a child may have more than one father, that contention was expressly rejected by the Court of Appeal in *Vincent B. v. Joan R.*, *supra*, 126 Cal.App.3d 619, which observed: "In enacting a conclusive presumption, the Legislature must have intended that only one man can be adjudicated a child's father." (*Id.*, at p. 627.)

Here, by granting summary judgment in favor of Gerald D. "pursuant to *Vincent B. v. Joan R.* and 621, as to complaint and cross-complaint," the trial court impliedly determined not only that Gerald D. was the presumed father of Victoria D., but also that Michael

H. has no legal rights regarding Victoria D. and is not entitled to rights of visitation under section 4601.

In *Vincent B.*, after the Court of Appeal upheld the conclusive presumption in favor of the natural mother's then ex-husband, it stated: "Finally, appellant contends that even if Frank is conclusively presumed to be Z.'s father, appellant should be allowed visitation rights, since Civil Code section 4601 gives discretion to grant visitation rights to 'any other person having an interest in the welfare of the child.' We think it obvious in the circumstances of this case such court-ordered visitation would be detrimental to the best interests of the child. Appellant's interest in visiting the child is based on his claim that appellant is Z.'s father. Such claim is now determined to be legally impossible. The mother does not wish the child to be visited by appellant. Confusion, uncertainty, and embarrassment to the child would likely result from a court order that appellant, who claims to be Z.'s biological father, is entitled to visitation against the wishes of the mother." (*Vincent B. v. Joan R.*, *supra*, 129 Cal.App.3d at pp. 627-628.)

## DISPOSITION

Summary judgment is affirmed. The case is remanded to the trial court so that it may determine, and make appropriate orders with regard to, the attorneys' fees and costs, if any, to which Victoria D. is entitled. The parties are to bear their own costs on appeal.

Lui, Acting P. J., and Danielson, J., concurred.

## PROOF OF SERVICE BY MAIL

*State of California*

ss.

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on October 28, 1987, I served the within Jurisdictional Statement in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States  
Supreme Court  
One First Street, N.E.  
Washington, D.C. 20543  
(Original + 40 Copies)

Gerald Dearing  
278 11th Street  
Apt. "A"  
New York, N.Y. 10014  
(3 Copies)

Leslie Shear  
5850 Canoga Avenue  
Suite 400  
Woodland Hills, CA 91367  
(3 Copies)

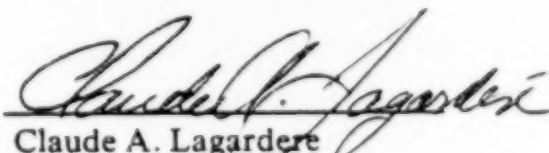
Larry Hoffman  
3660 Wilshire Boulevard  
Suite 1150  
Los Angeles, CA 90010  
(3 Copies)

Patricia Erickson  
Paul Hoffman  
A.C.L.U.  
633 South Shatto Place  
Los Angeles, CA 90005  
(3 Copies)

National Council  
For Childrens Rights  
2001 "O" Street, N.W.  
Washington, D.C. 20036  
(3 Copies)

Michael Oddinino  
3819 Park Place  
No. 14  
Montrose, CA 91020  
(3 Copies)

I declare under penalty of perjury that the foregoing is true  
and correct. Executed on October 28, 1987, at Los Angeles,  
California.

  
Claude A. Lagardere  
(Original signed)

2  
No. 87-746

Supreme Court, U.S.  
FILED

NOV 27 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

---

---

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term, 1987

MICHAEL H.,

Plaintiff, Cross-Defendant  
and Appellant,

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, LESLIE SHEAR,

Defendant, Cross-Complainant  
and Appellant,

vs.

GERALD D.,

Defendant, Cross-Defendant  
and Appellee.

---

**JURISDICTIONAL STATEMENT  
SUPPLEMENTAL APPENDIX**

**NEWMAN, AARONSON, KREKORIAN  
& VANAMAN  
VALERIE VANAMAN**

14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

**Counsel for Appellants**

---

---

106000

Document Index

Case Number CF 022753

In RE the matter of

HERSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROL,  
etc., et al.

Respondent

	<u>Page</u>
Minutes Entered March 31, 1983	A-1
PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM (AND ORDER) FILED APR 12 1983	A-4
Minutes Entered JUN 02 1983	A-7
Minutes Entered SEP 20 1983	A-9
Stipulation and Order FILED MAY 10 1984	A-11
ORDER TO SHOW CAUSE ORIGINAL FILED MAY 10 1984	A-14
TEMPORARY RESTRAINING ORDERS MAY 10 1984	A-16
STIPULATION FOR APPOINTMENT OF COURT INVESTIGATOR FILED JUN 14 1984	A-19
Minutes Entered 6-14-84	A-21
Minutes Entered 6-19-84	A-24

Minutes Entered 7-23-84	A-26
Minutes Entered 7-23-84	A-27
Minutes Entered 8-7-84	A-29
Minutes Entered 8-8-84	A-33
ORDER AFTER HEARING FILED AUG 9 1984	A-35
OSC HEARING CASE NO. CF 22753	A-41
Minutes Entered 10-24-84	A-47
Minutes Entered NOV 16 1984	A-48
Minutes Entered DEC 10 1984	A-49
Handwritten Document by JOHN H. SANDOZ JUDGE PRO TEM FILED OCT 4 1984	A-50
Minutes Entered JAN 14 1985	A-51
Minutes Entered JAN 28 1985	A-53
Minutes Entered FEB 20 1985	A-55
Minutes Entered MAR 12 1985	A-57
EX PARTE MOTION IN LIEU OF ORDER TO SHOW CAUSE FILED MAY 10 1985	A-59
Minutes Entered May 22 1985	A-61
NOTICE OF MOTION TO QUASH AND DIS- MISS AN ORDER TO SHOW CAUSE FILED DEC 11 1985	A-63

Minutes Entered DEC 30 1985	A-65
Minutes Entered JAN 22 1986	A-67
Minutes Entered JAN 24 1986	A-69
Minutes Entered MAY 6 1986	A-71
EX PARTE APPLICATION ORDER TO SHOW CAUSE FILED JUN 24 1986	A-73
Letter from Stephen M. Lachs, Supervising Judge of Superior Court to Leslie Shear, Guardian ad Litem DATED AUG 1 1986	A-75
Minutes Entered MAR 4 1987	A-77
Minutes Entered MAR 26 1987	A-82
FINDINGS AND ORDERS ON ORDERS TO SHOW CAUSE FILED MAR 30 1987	A-83
Minutes Entered 4-1-87	A-93
Minutes Entered 4-6-87	A-95
Minutes Entered SEP. 1 1987	A-97
SUPREME COURT ORDER DENYING REVIEW FILED JUL 30 1987	A-100

Minutes Entered March 31, 1983/County Clerk

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES - DEPT. 8

Date: March 31, 1983 F. COULTER, Dpty.Clk.

HONORABLE ROBERT A SCHNIDER  
Judge Pro Tem

RPTR. None

1. S. JOHNSON Deputy Sheriff

---

D CF 022753

In RE the matter of

HERSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROL, etc, et al, Respondent

LARRY M. HOFFMAN, Counsel for Petitioner (X)

JOEL S. AARONSON Counsel for Respondent (X)  
PETER WALZER (X)

---

NATURE OF PROCEEDINGS, DEFENDANTS' MOTION  
FOR AN ORDER TO QUASH, OR ENLARGE TIME  
FOR TAKING DEPOSITION OF CAROLE  
SINGLETON

The matter is called for hearing.

Counsel stipulate that Robert A. Schnider,

Commissioner, may hear this matter as

Judge Pro Tem.

Court and counsel confer in chambers.

The Court, having read and considered the moving and responding papers, and having heard the argument of counsel now orders as follows:

1. The Motion to quash the Notice of taking deposition per Section 2019(a)(2) of the code of Civil Procedure is denied. The Court finds that the Defendant was a resident of the county of Los Angeles at the time Notice was given.
2. The time for taking said deposition is hereby enlarged, and the deposition is now set for MAY 4, 1983, as otherwise previously Noticed.
3. The Court finds that the minor child VICTORIA DEARING is in need of independent legal representation, and that present counsel for said child has expressed an intent to withdraw. Pursuant to Section 4606 of the Civil Code, the Court hereby appoints Leslie Ellen Shear,

10880 Wilshire Blvd., #1900, Los Angeles,  
CA, 90024, phone (213) 470-1745, as co-  
counsel for said minor child, and as  
sole counsel if the withdrawal of the  
child's present counsel is approved.

This Minute Order constitutes Notice of the  
foregoing, a copy is sent to all counsel of  
record via U.S. Mail.

cc: JOEL AARONSON  
LARRY M. HOFFMAN  
PETER WALZER  
LESLIE ELLEN SHEAR

FILED APR 12 1983, John J. Corcoran,  
County Clk.  
By: F. Coulter, Deputy

LESLIE ELLEN SHEAR, Attorney at Law  
10880 Wilshire Blvd., #1900  
Los Angeles, CA. 90024  
(213) 470-1745

Attorney for Defendant,  
Victoria Carole Dearing

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MICHAEL HIRSCHENSOHN,	)	
Plaintiff,	)	CASE NO.
	)	CF 022753
vs.	)	
CAROLE SINGLETON, aka	)	PETITION FOR
CAROLE SINGLETON DEARING,	)	APPOINTMENT
and VICTORIA CAROLE DEARING,	)	OF GUARDIAN
A Minor,	)	AD LITEM
Defendants.	)	(AND ORDER)

Petitioner alleges:

1. On March 31, 1983 I was appointed as attorney for Defendant VICTORIA DEARING pursuant to Civil Code §4606.
2. VICTORIA DEARING was born on May 11, 1981 and is 23 months old.

3. Pursuant to Civil Code §7008, and Code of Civil Procedure §372, VICTORIA DEARING must appear in this action through a guardian ad litem. Although a purported answer has been filed in this action on behalf of VICTORIA DEARING by Defendant CAROLE SINGLETON, no guardian ad litem has been appointed, and the answer now on file is a nullity.

4. This Court has determined that VICTORIA DEARING is in need of independent representation. Therefore neither VICTORIA DEARING's mother, nor either of her putative fathers may serve as her guardian ad litem. The scope of Petitioner's present authority under Civil Code §4606 is unclear since that statute does not delineate the scope of such authority and there are no cases setting forth the scope of such authority. Appointment of separate guardian ad litem and counsel would entail unnecessary expense for the parties.

WHEREFORE, Petitioner prays that this Court appoint her as the guardian ad litem of VICTORIA DEARING to appear for her in this proceeding.

Dated: April 11, 1983

/s/  
LESLIE ELLEN SHEAR  
Attorney for Defendant  
VICTORIA DEARING

ORDER APPOINTING GUARDIAN AD LITEM

The petition of LESLIE ELLEN SHEAR for her appointment as guardian ad litem of the minor child, VICTORIA DEARING, born May 11, 1981 was presented to and read by the Court on this date. Petitioner appeared. Good cause appearing therefor, LESLIE ELLEN SHEAR is appointed guardian ad litem for VICTORIA DEARING, a minor, in the above entitled proceeding.

Dated: APR 12 1983

/s/  
ROBERT A. SCHNIDER  
Judge Pro Tem of the  
Superior Court

Minutes Entered JUN 02 1983/County Clerk

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES - DEPT. LA 2

Date: JUN 02 1983

HONORABLE RICHARD A LAVINE JUDGE

302 J CARRILLO Deputy Sheriff

J SORENSON DEPUTY CLERK

L DAVIS Reporter

---

1100AM

CF 22753 in RE the marriage of

HIRSCHENSOH, MICHAEL

Plaintiff

and

SINGLETON, CAROLE-ETC-ET AL

Defendant

Counsel for Petitioner JOEL S. AARONSON, ESQ.

Counsel for Respondent MACKEY-MANSFIELD

---

NATURE OF PROCEEDINGS

(1) MOTION OF DEFENDANT FILED MAY 5, 1983

FOR ORDER SEVERING TRIAL OF AFFIRMA-  
TIVE DEFENSE FROM TRIAL OF ALL OTHER  
ISSUES AND LIMITING DISCOVERY PENDING

Confidential

DETERMINATION OF TRIAL OF AFFIRMA-  
TIVE DEFENSE

- (2) MOTION OF DEFENDANT FILED APR 6,  
1983 FOR SUMMARY JUDGMENT AND FOR  
PROTECTIVE ORDERS RELATING TO DEPOSI-  
TION OF CAROLE DEARING. CONTINUED  
FROM APR 26, 1983 (1st CONT.)
- (3) MOTION OF DEFENDANT FILED MAY 13,  
1983 FOR ATTORNEY FEES AND COSTS  
PER CC #7011 & 4606

Confidential

Pursuant to written stipulation, the  
motions are continued to September 20,  
1983 at 11:00 a.m. in Department 2.

Minutes Entered SEP 20 1983/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: SEP 20 1983

HONORABLE RICHARD A LAVINE JUDGE

301 J CARRILLO Deputy Sheriff

J. SORENSON DEPUTY CLERK

D. LEWIS Reporter

---

1100 AM

CF 22753 in RE the marriage of

HIRSCHENSON, MICHAEL

Plaintiff

and

SINGLETON, CAROLE-ETC-ET AL

Defendant

Counsel for Petitioner J S AARONSON

Counsel for Respondent MACKEY-MANSFIELD

---

NATURE OF PROCEEDINGS.

(1) MOTION OF DEFENDANT FILED MAYY 5,  
1983 FOR ORDER SEVERING TRIAL OF AF-  
FIRMATIVE DEFENSE FROM TRIAL OF ALL  
OTHER ISSUES AND LIMITING DISCOVERY  
PENDING DETERMINATION OF TRIAL OF

Confidential

Confidential

AFFIRMATIVE DEFENSE. CONTINUED FROM  
6/2/83. (1st CONT.)

- (2) MOTION OF DEFENDANT FILED APR 6,  
1983 FOR SUMMARY JUDGMENT AND FOR  
PROTECTIVE ORDERS RELATING TO DEPOSI-  
TION OF CAROLE DEARING. CONTINUED  
FROM JUN 2, 1983. (2nd CONT.)
- (3) MOTION OF DEFENDANT FILED MAY 13,  
1983 FOR ATTORNEY FEES AND COSTS PER  
CC #7011 & 4606 CONTINUED FROM  
JUN 2, 1983. (1st CONT.)

Defendant's motions are placed off  
calendar, at the request of the moving  
party.

FILED MAY 10 1984, John J. Corcoran,  
County Clk.  
By: F. Coulter, Deputy

---

(Handwritten)

Plaintiff:

MICHAEL HIRCHENSOHN

v.

Defendant:

CAROLE SINGLETON, et al

CF 022753

Stipulation and  
Order

Re: Appointment of  
Expert, Expert's  
Fees, Attorney's  
Fees

---

It is hereby stipulated by and between  
the parties through their attorneys of  
record that:

1. One of the following mental health  
professionals (Dr. Robin Drapkin, Dr. Norman  
Stone, Dr. Frank Williams, Dr. Jane Bryson,  
Dr. Jack Share) to be designated by the  
minor child's guardian ad litem, Leslie Ellen  
Shear, is appointed as the Court's expert  
under Evidence Code §730 to serve the dual  
functions of assisting the guardian ad litem  
in determining the child's best interests,

and providing evidence in this matter.

2. The parties are ordered to cooperate with the guardian ad litem and expert witness in making themselves and the minor child available, and in the evaluation process.

3. The written reports of the expert to the Court shall be admitted into evidence at any hearing in this matter, subject to the right of the parties to call the expert for cross-examination.

4. Gerald Dearing shall be invited to participate in the evaluation process.

5. The court shall have continuing jurisdiction to award fees to the expert witness and to the guardian ad litem/attorney for the child, and shall make a preliminary fee award at the June 12, 1984 hearing of this matter.

6. The issue of whether the parties must cooperate with the expert witness to

temporarily modify the custody-visitation  
order in connection with the evaluation  
shall be before the Court of the hearing of  
this OSC

NEWMAN, AARONSON,  
VANAMAN, KREKORIAN

By: /s/  
Attorney for Plaintiff  
Michael Hirschensohn

MACKEY and MANSFIELD

By: /s/  
LARRY M. HOFFMAN  
Attorney for CAROLE  
SINGLETON DEARING

Leslie Ellen Shear  
Attorney and guardian  
as litem for VICTORIA  
CAROLE DEARING

IT IS SO ORDERED: That these orders and  
temporary Orders made this date by the Court  
shall remain in full force & effect until  
the date of June 12, 1984, stipulated by all  
counsel as the hearing date of the OSC's  
before the Court.

5/10/84

/s/  
Judge Pro Tem.  
JOHN H. SANDOZ

A-13

ORDER TO SHOW CAUSE  
ORIGINAL FILED MAY 10 1984/County Clerk

Attorney  
JOEL AARONSON  
NEWMAN, AARONSON, VANAMAN, KREKORIAN  
14001 Ventura Blvd., Sherman Oaks, CA  
2139907722

Plaintiff

---

SUPERIOR COURT OF CALIFORNIA,  
County of Los Angeles  
111 N. Hill St.  
L.A. CA 90012

CENTRAL

---

MARRIAGE OF

Plaintiff: Michael Hirschenson

Defendant: Carole Singleton

---

ORDER TO SHOW CAUSE

Visitation

Other(Specify): Pendente Lite  
Order re Visitation

Case Number CF 022753

- 1 To CAROLE SINGLETON, aka CAROLE SINGLETON DEARING
- 2 YOU ARE ORDER TO APPEAR IN THIS COURT AS FOLLOWS TO GIVE ANY LEGAL REASON WHY THE RELIEF SOUGHT IN THE ATTACHED APPLICATION SHOULD NOT BE GRANTED
  - a June 12, 1984 8:30 A.M. Dept 2 Rm. 215
  - b Address of court  
111 N. Hill St., L.A., CA 90012

A-14

. . .

. . .  
c [x]Other(specify)

DEFENDANT SHALL  
PERMIT PLAINTIFF TO VISIT WITH  
VICTORIA DEARING ON FRIDAY, MAY 11,  
1984 FROM 3:00-5:00 P.M. AT THE  
WESTREY SCHOOL, PLAYA DEL REY.

...

JOHN H. SANDOZ  
JUDGE PRO TEM

Judge of the Superior  
Court

Dated: MAY 10 1984

TEMPORARY RESTRAINING ORDERS MAY 10 1984

MARRIAGE OF

HIRCHENSOHN vs. SINGLETON, etc. et al.,

Case Number CF 022753

TEMPORARY RESTRAINING ORDERS  
(FAMILY LAW ATTACHMENT)

1. [xx] RESTRAINT PERSONAL CONDUCT

(init.)

a. [xx] Plaintiff shall not ~~harass~~,

molest, attack, strike, threaten,

sexually assault, batter,

(init.)

~~telephone~~ or otherwise disturb

the peace of CAROLE SINGLETON,

[x] and the following family or

household members: VICTORIA

DEARING

. . .

3. [xx] STAY AWAY ORDERS

Plaintiff

[xx]Petitioner must stay at least

(init.)

~~100~~ 50 yards away from the

following places:

a. [xx] Residence of CAROLE SINGLETON

6407 Ocean Front Walk,

Playa Del Rey, CA

. . .

c. [xx] The children's school: Westrey  
311 Culver Boulevard,  
Playa Del Rey  
(init.) (Except on May 11, 1984  
from 2:30 P.M. to 5:00 P.M.)

. . .

. . .

. . .

7.[x] By the close of business on the date  
of this order a copy of this order  
and any Proof of Service shall be  
delivered to the law enforcement  
agencies listed below as follows:

[xx] the Clerk of the Court shall mail.

Los Angeles Police Department

Mail Unit-Room 15  
150 North Los Angeles Street  
Los Angeles, CA 90012

8. [xx] OTHER ORDERS

PENDING A HEARING. DEFENDANT, CAROLE  
SINGLETON, is awarded sole physical and  
legal custody of the minor child, VICTORIA  
CAROLE DEARING, born May 11, 1981.

9. This order is effective when made. Law enforcement agencies shall enforce it immediately upon receipt. If proof of service on the restrained person has not been received by the law enforcement agency, the law enforcement agency shall advise the restrained person of the terms of this order.

Dated: May 10 1984 /s/  
\_\_\_\_\_  
(Judge of the Superior Court)  
JOHN H. SANDOZ  
JUDGE PRO TEM

---

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a copy of the foregoing was mailed first class, postage prepaid in a sealed envelope addressed as shown in item 7, and that the mailing of the foregoing and execution of this certificate occurred at LOS ANGELES, California, on May 10 1984

Clerk, by/s/ \_\_\_\_\_ Deputy  
F. COULTER

STIPULATION FOR APPOINTMENT OF COURT  
INVESTIGATOR  
FILED JUN 14 1984/County Clerk

---

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MICHAEL HIRSCHENSOHN

Case Number

CF 022753

v.

CAROLE SINGLETON, et al.

STIPULATION FOR  
APPOINTMENT OF  
COURT INVESTIGATOR

---

Pursuant to the provisions of Civil Code Section 4602, the parties, though their respective counsel, hereby stipulate to the appointment of the Court Investigator to make a limited investigation and report to the Court in this matter in reference to the custody or visitation of the minor child/children of the parties. Report shall be limited to a CII report from California, Florida, Virgin Islands concerning Plaintiff.

It is further stipulated that said report, including all attached documentation, be received in evidence without foundation, and without objection to hearsay or any

other objection, and the investigator will not be called to testify and need not be present at any hearing.

The minor(s) is/are: VICTORIA CAROLE  
DEARING

The information requested by the child custody information form will be supplied forthwith.

It is further stipulated that the report may be sealed and shall not be inspected by anyone other than counsel of record and NO ADDITIONAL COPIES SHALL BE MADE AND/OR DISTRIBUTED BY COUNSEL WITHOUT PRIOR ORDER OF COURT.

The Court now has authority to order reimbursement for the expense of the investigation and report. (4602 C.C.)

Dated June 14, 1984 /s/ \_\_\_\_\_  
Counsel for Minor Child  
Guardian ad litem  
/s/ \_\_\_\_\_  
Counsel for Plaintiff /s/ \_\_\_\_\_  
Counsel for Defendant  
/s/ \_\_\_\_\_  
Plaintiff Defendant

Minutes Entered 6-14-84/County Clerk

Date 6-14-84

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 2

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Deputy Sheriff

M. Hiles D.65 Deputy Clerk

L. Holton Reporter

---

C 022 753

HERISCHENSOHN, MICHAEL, Plaintiff [x]

and

SINGLETON, CAROLE, Defendant [x]

Counsel for Plaintiff Joel Aaronson [x]

Counsel for Defendant L. Hoffman [x]  
Leslie E. Shear [x]  
(for the child)

---

NATURE OF PROCEEDINGS: Plaintiff's Order to  
Show Cause re  
Visitation Pendente  
Lite

Defendant's Order to  
Show Cause re Tem-  
porary Restraining  
Orders

Motion of defendant's attorney to renew his  
motion to continue is heard and denied.

Motion of the defendant's attorney to dismiss on the ground that this Court lacks jurisdiction to order visitation pendente lite, is heard and denied.

Motion of the defendant's attorney to have Mr. Dearning present to testify is heard and denied. The court will adopt the recommendations of Dr. Stone.

Parties are sworn and testify. Witness Dr. Norman M. Stone is sworn and testifies.

Child's Exhibit #1 (Resume - Norman M. Stone, Ph.D.); and #2 (Expenses rendered by Norman M. Stone and Susan F. Stone); are received in evidence.

Plaintiff's Exhibit #1 (Stipulation for Judgment) is received in evidence and withdrawn.

The Court directs the Office of the Court Investigator to conduct an investigation which is to be limited to running a CII - Criminal Record check on the plaintiff in re the States of California, Florida, and the Virgin Islands. Upon receipt of the Los Angeles report, the Court requests that it be sent to Department 65 forthwith.

Counsel for the plaintiff is directed to prepare an attorney order based upon the order of the Court as contained in the notes of the Official Court Reporter, and forward same to opposing counsel for approval as to form and content.

The issues of attorney's fees and court costs, the cost of the report of the Court Investigator, and the costs of Dr. Stone are taken under submission.

(No File)  
Minutes Entered 6-19-84/County Clerk

Date 6-19-84

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES - DEPT. 2

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Deputy Sheriff

M. Hiles D. 65 Deputy Clerk

None Reporter

---

C 022 753

HIRSCHENSON, MICHAEL, Plaintiff

and

SINGLETON, CAROLE, Defendant

Counsel for Plaintiff Joel Aaronson

Counsel for Defendant L. Hoffman  
Leslie E. Shear  
(for the child)

---

NATURE OF PROCEEDINGS. ORDER RE MATTERS  
SUBMITTED ON  
JUNE 14, 1984

The Court having taken this matter under sub-  
mission on June 14, 1984, said Court now  
renders the following orders:

The plaintiff and the defendant shall each  
pay one-half of the fees of Dr. Stone, the  
report of the Court Investigator when

obtained, and counsel for the minor child,  
Leslie E. Shear.

Any order re attorney's fees and court costs  
not covered in the above paragraph shall be  
reserved until further order of the Court,  
or the time of trial.

Counsel of record notified by  
U.S. Mail.

Minutes Entered 7-23-84/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date: July 23, 1984

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Deputy Sheriff

E. Wchwartz Deputy Clerk

M. Hiles D. 65

None Reporter

CF 022 753 In RE the marriage of

HIRSCHENSOHN, MICHAEL JOEL Petitioner

and

SINGLETON, CAROLE

Respondent

Counsel for Petitioner Joel Aaronson

Counsel for Respondent L. Hoffman

Leslie E. Shear  
(for the child)

NATURE OF PROCEEDINGS.

EX PARTE ORDER SEALING EXHIBIT

Court's Exhibit 1 (sealed envelope containing

(Child Custody Report ) is received in

evidence and ordered sealed, to be opened

by no one except counsel of record, or upon

Court order.

Minutes Entered 7-23-84/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date 7-23-84

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Deputy Sheriff

M. Hiles D. 65 Deputy Clerk

None Reporter

---

CF 022 753 In re the Marriage of

HIRSCHENSOHN, MICHAEL JOEL, Petitioner

and

SINGLETON, CAROLE, Respondent

Counsel for Plaintiff Joel Aaronson

Counsel for Defendant L. Hoffman

Leslie E. Shear

(for the child)

---

NATURE OF PROCEEDINGS:

ORDER RE PAYMENT OF CHILD CUSTODY INVESTIGATION REPORT

The Court finds that the cost for the preparation of the Child Custody Investigation Report is \$27.97.

Court's Exhibit #1 (Child Custody Evaluation) is received in evidence and is ordered sealed, to be opened by no one except counsel of record, or upon court order.

Respondent is ordered to pay \$13.64.

A copy of this minute order is sent by U.S. Mail this date to the parties or their counsel of record, addressed as follows:

Copy to: Dept. of Treasurer-Tax Collector,  
2612 S. Grand Ave., Los Angeles,  
Ca. 90007, Attn:: Ed Davis, Chief  
of Public Services

Court Investigator's Office,  
Room 228, Co. Courthouse

Minutes Entered 8-7-84/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date: Aug. 7, 1984

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Sheriff

M. Hiles D. 65 Deputy Clerk

L. Holton Reporter

---

CF 022 753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Plaintiff [x]

and

SINGLETON, CAROLE

aka CAROLE DEARING Defendant [x]

Counsel for Petitioner J. S. Aaronson [x]

Counsel for Respondent L. Hoffman [x]

---

NATURE OF PROCEEDINGS

[x] PETR ORDER TO SHOW CAUSE IN RE:

Contempt of order of 6-13-84

(cont't from 8-6-84)

. . .

[x] Citee is advised of the nature of the proceedings, burden of proof, the right to counsel, the right against self incrimination and the right to a full hearing.

[x] Citee knowingly and intelligently waives his right and the matter proceeds to hearing.

. . .

[x] Petitioner is sworn and testifies.

[x] Respondent is sworn and testifies.

. . .

[x] The court finds that a lawful order was made on 6-13-84, that the citee had knowledge of the order, that the citee had the ability to comply with the order, that he failed to comply therewith, and that his failure was willful. The citee is adjudged to be in contempt of court on 6 counts, on Count 1 - removing the minor child in excess of two weeks from the County of Los Angeles; Count 2 - denying telephone access to the plaintiff; \*\*\*\*

Citee is sentenced to serve 5 days in the county jail on each count, to run

consecutively, Citee is remanded to the custody of the Sheriff.

. . .

[x] OTHER Motion of defendant's attorney to dismiss Count 2 of the contempt citation is heard, and denied.

\*\*\*\*

Count 3 - June 25; Count 4 - July 2; Count 5 - July 19; and Count 6 - July 16, 1984.

At such time as the child Victoria is returned to this jurisdiction and if it is brought to the Court's attention, the matter will be placed back on calendar. Further, the court will consider suspending the balance of the time to be served, and place the defendant on probation.

Each party shall bear one-half of the costs of Dr. Stone's continuing billing for rees.

In order to receive the report of Dr. Stone and to have a hearing thereon, this matter is set in Dept. 2 at 8:30 a.m. on October 1, 1984.

Defendant's Exhibit A (2 - TWA Passenger Tickets for Victoria Dearing and Carole Dearing) is received in evidence and withdrawn by defendant's attorney.

Minutes Entered 8-8-84/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date; Aug. 8, 1984

HONORABLE D. E. SCHEMPP JUDGE

S. Branche Sheriff

M. Hiles D. 65 Deputy Clerk

L. Holton Reporter

---

CF 022 753 In RE the marriage of

HIRSCHENSOHN, MICHAEL, Plaintiff [x]

and

SINGLETON, CAROLE

aka Carole Dearing, Defendant

Counsel for Petitioner J. S. Aaronson [x]

Counsel for Respondent L. Hoffman [x]

L. Shear [x]

---

NATURE OF PROCEEDINGS: [x] PETR ORDER TO  
SHOW CAUSE IN RE:

Contempt of order of

(con'd from 8-7-84)

. . .

[x] OTHER Plaintiff, and his attorney,  
counsel for the defendant, and counsel for  
the child are all present in Court.

It is stated for the record and repre-  
sented to the Court, that the defendant has  
cooperated and has had the minor child  
Victoria returned to the jurisdiction of

this Court. The Court orders the defendant to be released forthwith from County Jail. Further, said defendant is ordered to appear on August 9, 1984 at 9:00 a.m. in Department 65.

The Court issues an Attachment of Defaulter to be issued and held for the defendant Carole Singleton aka Dearing until August 9, 1984 at 9:00 a.m. in Department 65.

Superior Court Release #199060.

ORDER AFTER HEARING

FILED AUG 9 1984 John J. Corcoran,  
County Clk.  
By M.S. HILES, Deputy

MACKEY AND MANSFIELD  
717 W. Temple St., Suite 300  
Los Angeles, CA 90012  
485-0500

Attorneys for Defendant  
CAROLE SINGLETON DEARING

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MICHAEL HIRSCHENSOHN,	)	
Plaintiff,	)	CONFIDENTIAL
vs.	)	
CAROLE SINGLETON DEARING,	)	No. CF 022753
et al.,	)	
Defendant.	)	ORDER AFTER
	)	HEARING
VICTORIA CAROLE DEARING,	)	
a minor,	)	
Cross-complainant,	)	
vs.	)	
GERALD DEARING, et al.,	)	
Cross-defendants.	)	

The Order to Show Cause Re Visitation  
filed by Plaintiff May 10, 1984, and the  
order to Show Cause Re Custody and Injunctive  
Relief filed by Defendant, CAROLE SINGLETON

DEARING, on May 10, 1984, came on regularly for hearing on June 14, 1984, in Department 65 of the above-entitled court, Commissioner DARLENE SCHEMP, Judge Pro Tempore, presiding.

The court denied the motions of Defendant, CAROLE SINGLETON DEARING to continue the hearing and to dismiss Plaintiff's Order to Show Cause Re Visitation.

After full evidentiary hearing, the Court made the following orders:

1. The Court makes no finding with respect to the issue of paternity or order with respect to the applicability or effect of Evidence code Section 621. Over the objection of Defendant, CAROLE SINGLETON DEARING, the court adjudges that it has authority, pursuant to the second sentence of Civil Code Section 4601, to award Plaintiff pendente lite visitation with the minor child, VICTORIA CAROLE DEARING, born May 11, 1981.

2. Defendant, CAROLE SINGLETON DEARING, is awarded custody of said minor child. Plaintiff shall have visitation with said minor child once per week, for a period not to exceed 3 hours, commencing Friday, June 15, 1984, and continuing until further Order of the Court. Said visitation shall be arranged so that the minor is picked up and returned to the Nursery School she attends. In the event Defendant changes the Nursery School, or Defendant does not send the minor to Nursery School, Plaintiff and Defendant through respective counsel shall arrange an appropriate pick-up and return site which, when practicable, shall be out of the presence of the Defendant. In the event the minor is ill on a day which has been designated Plaintiff's visitation day, Defendant shall make arrangements through her counsel and counsel for Plaintiff for an alternate day.

3. Defendar. shall be permitted to remove the child from the County of Los Angeles and thereby deprive Plaintiff of his visitation with the child. Said period of removal shall not deprive the Plaintiff of more than one visit with the child.

4. Plaintiff shall be allowed to call the minor once per week at a time previously set, either through the cooperation of the minor's Nursery School, or by mutual arrangement between Plaintiff and Defendant through their respective counsel.

5. The Plaintiff and Defendant are Ordered to cooperate with DR. NORMAN STONE in his preparation for the Court of an in-depth social study concerning custody and visitation patterns at a date set by the parties but in no event less than 90 days from the date of this hearing.

6. Plaintiff and Defendant are Ordered restrained from annoying, harrassing,

molesting, or touching each other in any manner whatsoever. Plaintiff is ordered to stay 100 feet away from the physical presence of the Defendant.

7. Plaintiff and Defendant are restrained from making any derogatory remarks about the other in the presence of the minor child.

8. Plaintiff is Ordered to cooperate with DR. STONE in obtaining appropriate therapy to deal with his relationship with the minor child and Defendant.

9. The Court retains jurisdiction to determine the extent and contributive share of the parties concerning attorney's fee for minor's counsel, LESLIE SHEAR, expert fees payable to DR. STONE and costs to be awarded to minor's counsel, LESLIE SHEAR.

DATE: Aug 1984

JUDGE OF THE SUPERIOR  
COURT  
(By: RICHARD A. LAVINE)

APPROVED AS TO FORM AND CONTENT:

DATE: 8/9/84

JOEL AARONSON, Attorney  
for Plaintiff, MICHAEL  
HERSCHINSON

DATE:

MACKEY AND MANSFIELD

By:

LARRY M. HOFFMAN,  
Attorneys for Defen-  
dant CAROLE SINGLETON  
DEARING

DATE:

LESLIE ELLEN SHEAR,  
Attorney for Minor  
VICTORIA DEARING

OSC HEARING CASE NO. CF 22753

ADMITTED IN EVIDENCE 10-23-84

John J. Corcoran, County Clk.

By: T. ACUNA, Deputy

(Handwritten)

CF 022753

It is hereby stipulated by and between the parties through their respective attorneys of record, that the prior temporary orders in this matter are modified in the following particulars only.

1) Without reaching the question of the applicability of Evidence Code §621, the Court finds Plaintiff Michael Hirshensohn to be a person interested in the welfare of Victoria Carole Dearing, and exercises its discretion pursuant to the second sentence Civil Code §4601 to grant him the temporary visitation rights set forth below until further order of court.

2) For purposes of this order the 4th weekend of each month refers to the weekend

commencing on the 4th Saturday of the month.

3) Plaintiff shall be entitled to twelve weekend visits with Victoria each year. The weekend visits in November and December of 1984 and January of 1985 shall be from 10 a.m. to 6 p.m. on Sunday. The Court retains jurisdiction to modify the hours of the visits commencing in February, 1985.

4) The visits shall take place according to the following schedule:

(\*Evaluation Dates)

	1984	1985	1986	1987
January		2nd	2nd	2nd
February		2nd*	2nd	2nd
March		2nd	2nd	2nd
April		2nd	2nd	2nd
May		2nd	2nd	2nd
June		2nd	2nd	2nd*
July		4-5	4-5	4-5
August		2nd	2nd	2nd
September		2nd	2nd	2nd
October		2nd	2nd	2nd
November	4th weekend	4th	2nd	4th
December	4th weekend	4th	2nd	4th

5. Plaintiff shall be entitled to one, ten-minute telephone call per week with the minor child, to be initiated by CAROLE DEARING at 5 p.m. (California time) each Thursday (7 p.m. New York time when Plaintiff is in the Virgin Islands or New York.)

6. Plaintiff is restrained from contacting the minor child except at the times and places set forth herein, or by stipulation of the parties.

7. The parties are ordered to participate in review evaluations by Dr. Norman Stone in February, 1985 (for the purpose of ascertaining whether the visits should include overnights and what the duration of the visits should be) and in June, 1987 (for recommendations as to what future orders will be in Victoria's best interests).

8. Plaintiff is ordered to advance one-half of the cost of each evaluation and Defendants Carole Dearing and Gerald Dearing

are ordered to advance one-half of each evaluation, subject to reimbursement if the Court deems it appropriate.

9. The written reports of Dr. Stone shall be admitted into evidence at any hearing concerning custody or visitation, subject to the right of cross-examination.

10. Plaintiff is ordered to pay forthwith to Leslie Ellen Shear the sum of \$750.00 as and for attorneys fees. Defendants CAROL DEARING and Gerald Dearing are ordered to pay to Leslie Ellen Shear the sum of \$750.00 as and for attorneys fees.

11. The November, 1984 visit shall take place in Los Angeles. Thereafter 9 visits per year shall take place in New York and three visits per year shall take place in Los Angeles. Whenever the November visit occurs on the Saturday immediately following Thanksgiving, that visit shall be one of the three annual Los Angeles visits. Defendant(s)

are ordered to provide Victoria's transportation for the Los Angeles visits. Other than those Los Angeles visits specified abovd, the months of the Los Angeles visits shall be designated in writing by Carole Dearing on or before March 1, 1985 (for the 1985 visits) and on or before October 1 of the prior year for 1986 and 1987 visits. Absent written agreement of the parties, the visits in November (except as provided abovd) through April must take place in New York, at the expense of Plaintiff.

12) Each party has authorized his or her respective counsel to enter into this stipulation and waives the right to further notice of this order.

13) This matter is continued to March 6, 1985 in Department 2 at 8:30 a.m.

/s/  
Joel Aaronson  
Attorney for Plaintiff

/s/  
Larry Hoffman Attorney  
for Defendant Carole  
Dearing

/s/  
Glen Schwartz Attorney  
for Defendant Gerald  
Dearing

/s/  
Leslie Ellen Shear,  
guardian ad litem and  
Attorney for Defendant  
Victoria Dearing

It is so ordered.

Minutes Entered 10-24-84/County Clerk

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES - Dept. 6

Date: OCTOBER 24, 1984  
HONORABLE FRANCES ROTHSCHILD JUDGE  
E. RODGERS Deputy Sheriff  
T. ACUNA Deputy Clerk  
None Reporter

---

CF 22753 In RE the marriage of  
HIRSCHENSOHN, MICHAEL Petitioner  
and

SINGLETON, CAROLE  
DEARING, VICTORIA, MINOR Respondent

Counsel for Petitioner J.S.AARONSON  
G. SCHWARTZ  
Counsel for Respondent L. HOFFMAN  
L. SHEAR

---

NATURE OF PROCEEDINGS

ORDER SEALING EXHIBIT

Court's exhibit 1 (Family Evaluation) is  
marked for identification and sealed pur-  
suant to the order of this court.

Minutes Entered NOV 16 1984/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date: NOV 16 1984

HONORABLE RICHARD A. LAVINE JUDGE

303 J. CARRILLO Deputy Sheriff

V. CRESEP Deputy Clerk

J. COFFLER Reporter

---

1100 AM

C F 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Plaintiff

and

SINGLETON, CAROLE-ET AL Defendant

---

NATURE OF PROCEEDINGS

MOTION OF DEFENDANT FILED OCT 19, 1984  
FOR SUMMARY JUDGMENT

Confidential Pursuant to telephonic request of moving  
party, motion is ordered continued to  
December 10, 1984 at 11:00 am in  
Department 2.

Moving party shall serve notice.

Minutes Entered DEC 10 1984/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. 2

Date: DEC 10 1984

HONORABLE STEPHEN LACHS JUDGE  
302 J. CARRILLO Deputy Sheriff  
p. TINNELL Deputy Clerk  
S. TAYLOR Reporter

---

1100AM

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL Respondent

---

NATURE OF PROCEEDINGS

MOTION OF DEFENDANT FILED OCT 19, 1984  
FOR SUMMARY JUDGMENT. CONTINUED FROM  
NOV 16, 1984. (1st Cont.)

Motion is continued to January 14, 1985,  
at 11:00 am in Dept 2.

Counsel for moving party to give notice.

Confidential

FILED OCT 4 1984/JOHN J. CORCORAN, CTY.CLK.  
F. COULTER, Deputy

(Handwritten)

The Court finds that the child will benefit from a short delay of the visits scheduled for the weekend of October 5 through October 8, because of the risk that she will become involved in the confrontation and/or conflict between the parties associated with the pending orders to show cause.

THEREFORE, the Court orders that the visits that would ordinarily take place on October 5 and October 8 be postponed only until the weekend of October 12 through October 15, on dates and at times to be agreed upon among the parties, and shall continue at two week intervals thereafter, until further order of Court.

/s/

JOHN H. SANDOZ  
JUDGE PRO TEM

OCT 4 1984

A-50

Minutes Entered JAN 14 1985/County Clerk  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES - Dept. LA 2

Date: JAN 14 1985  
HONORABLE STEPHEN M. LACHS JUDGE  
302 J. CARRILLO Deputy Sheriff  
V. SMITH Deputy Clerk  
D. SAYLER Reporter

---

1100AM

CF 22753 In RE the marriage of  
HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL Respondent

Counsel for Petitioner J. AARONSON (X)

L. SHEAR (X)

Counsel for Respondent SCHWARTZ(X)

L. HOFFMAN (X)

---

NATURE OF PROCEEDINGS

(1) MOTION OF DEFENDANT FILED OCT 19,  
1984 FOR SUMMARY JUDGMENT. CON-  
TINUED FROM DEC 10, 1984. (2nd  
CONT.)

(2) MOTION OF DEFENDANT FILED DEC 28,  
1984 FOR ATTORNEY FEES AND COSTS:  
CCP 2034(a) and CCP 2019(b)(2)  
FOR COMPELLING ANSWERS TO QUESTIONS

Confidential

PROPOUNDED AT DEPOSITION, COMPELLING  
DEPOSITION TO TAKE PLACE IN LOS  
ANGELES.

Confidential

Motions are continued to January 28,  
1985 at 11:00 a.m. in Department 2.

Notice is waived.

Minutes Entered JAN 28 1985/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: JAN 28 1985

HONORABLE STEPHEN M. LACHS JUDGE

301 J. CARRILLO Deputy Sheriff

V. SMITH Deputy Clerk

D. SALYER Reporter

---

1100AM

F 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL Respondent

Counsel for Petitioner AARONSON-SHEAR, L.(X)

V. DEHOUNG (X)

Counsel for Respondent G. SCHWARTZ-

HOFFMAN, L. (X)

L. SHEAR: MINOR ATTORNEY (X)

---

NATURE OF PROCEEDINGS:

(1) MOTION OF DEFENDANT FILED OCT. 19,

1984 FOR SUMMARY JUDGMENT. CONTINUED

FROM JAN 14, 1985 (3RD CONT)

(2) MOTION OF DEFENDANT FILED DEC. 28,

1984 FOR ATTORNEY FEES AND COSTS:

CCP 2034(a) and CCP 2019(b)(2) FOR

COMPELLING ANSWERS TO QUESTIONS PRO-

POUNDED AT DEPOSITION COMPELLING

DEPOSITION TO TAKE PLACE IN LOS ANGELES.

Confidential

CONTINUED FROM JAN. 14, 1985 (1ST CONT)

Defendant's motion for Summary Judgment is granted pursuant to Vincent B. V. Joan, R., and 621. as to complaint and cross-complaint.

Defendant's motion for attorney fees and costs; CCP #2034(a) and CCP #2019(b)(2) for compelling answers to questions propounded at deposition to take place in Los Angeles is denied, as irrelevant after Summary Judgment.

Defendant to serve notice.

Counsel for defendant is directed to prepare the judgment and submit it to opposing counsel for approval as to the form and content.

On February 20, 1985 at 11:00 a.m. in Department 2, a hearing is set for purpose of determining what issues, if any, survive granting of motion for summary judgment.

Minutes Entered FEB 20 1985/County Clerk

NO FILE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: FEB 20 1985

HONORABLE ROBERT A. SCHNIDER JUDGE PRO TEM

302 J. CARRILLO Deputy Sheriff

V. SMITH Deputy Clerk

C. DUARTE Reporter

---

1100AM

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL Respondent

Counsel for Petitioner AARONSON-SHEAR

Counsel for Respondent SCHWARTZ-HOFFMAN

---

NATURE OF PROCEEDINGS

(1) MOTION OF DEFENDANT FILED OCT 19,  
1984 FOR SUMMARY JUDGMENT. CONTINUED  
FROM JAN 28, 1985. (4TH CONT)

(2) MOTION OF DEFENDANT FILED DEC. 28,  
1984 FOR ATTORNEY FEES AND COSTS:  
CCP 2034(a) and CCP 2019(b)(2) FOR  
COMPELLING ANSWERS TO QUESTIONS PRO-  
POUNDED AT DEPOSITION, COMPELLING  
DEPOSITION TO TAKE PLACE IN

Confidential

LOS ANGELES. CONTINUED FROM JAN 28,  
1985 (2ND CONT)

Confidential Pursuant to telephonic request of moving  
party, Defendant's motion is continued  
to March 12, 1985 at 11:00 a.m. in De-  
partment 2.

Moving party to serve notice.

Minutes Entered MAR 12 1985/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: Mar 12 1985

HONORABLE STEPHEN M. LACHS JUDGE

301 J. CARRILLO Deputy Sheriff

V. SMITH Deputy Clerk

D. SALYER Reporter

---

1100AM

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL

Counsel for Petitioner J. AARONSON-  
SHEAR, L. (X)

Counsel for Respondent G. SCHWARTZ-  
HOFFMAN, L. (X)

---

NATURE OF PROCEEDINGS:

(1) MOTION OF DEFENDANT FILED OCT 19,  
1984 FOR SUMMARY JUDGMENT. CONTINUED  
FROM FEB 20, 1985 (5TH CONT)

Confidential (2) MOTION OF DEFENDANT FILED DEC. 28,  
1984 FOR ATTORNEY FEES AND COSTS:  
CCP 2034(a) AND CCP 2019(b)92) FOR  
COMPELLING ANSWERS TO QUESTIONS PRO-  
POUNDED AT DEPOSITION, COMPELLING  
DEPOSITION TO TAKE PLACE IN

LOS ANGELES. CONTINUED FROM FEB 20,  
1985 (3RD CONT)

Confidential

All pleadings have been submitted.  
The court takes this matter under  
submission.

EX PARTE MOTION IN LIEU OF ORDER TO SHOW  
CAUSE FILED MAY 10 1985 Frank S. Zolin  
County Clerk  
By F. Coulter  
Deputy

---

JOEL A. AARONSON  
NEWMAN.AARONSON.KREKORIAN.VANAMAN  
14001 Ventura Blvd.  
Sherman Oaks, California 91423  
(818) 990-7722

Attorney for Plaintiff, MICHAEL HIRSCHENSOHN

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
111 N. Hill St.  
Los Angeles, California  
Central

---

Plaintiff:

MICHAEL HIRSCHENSOHN

Defendants:

CAROLE SINGLETON, aka CAROLE  
SINGLETON DEARING, et al.

---

EX PARTE MOTION IN LIEU OF ORDER TO SHOW  
CAUSE [xx] Visitation  
Case Number CF 022753

---

1. TO: CAROLE SINGLETON, aka CAROLE  
SINGLETON DEARING, and GERARD  
DEARING
2. YOU ARE ORDERED TO APPEAR IN THIS COURT  
AS FOLLOWS TO GIVE ANY LEGAL REASON WHY  
THE RELIEF SOUGHT IN THE ATTACHED  
APPLICATION SHOULD NOT BE GRANTED

. . .

b. Address of court:

111 N. Hill St., Los Angeles, CA 90012

. . .

3. ...

c. ☒ Other (specify):

Plaintiff Michael Hirschensohn may visit with the minor Victoria Dearing in the City of New York for a six hour period between Noon and 7:00 P.M. on either (but not both) Saturday, May 11, 1985 or Sunday, May 12, 1985.

DENIED MAY 10 1985

KENNETH A. BLACK  
JUDGE PRO TEM

Judge of the Superior Court

Minutes Entered MAY 22 1985/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: MAY 22, 1985

HONORABLE STEPHEN M. LACHS JUDGE

J. CARRILLO Deputy Sheriff

V. L. SMITH Deputy Clerk

None Reporter

---

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, CAROLE-ET AL Respondent

Counsel for Petitioner L. SHEAR &

J. AARONSON

Counsel for Respondent SCHWARTZ &

HOFFMAN

---

NATURE OF PROCEEDINGS.

COURT'S RULING ON DEFENDANT'S MOTION

TAKEN UNDER SUBMISSION ON MARCH 12,

1985

The court, having taken defendant motion  
under submission on March 12, 1985, now  
rules as follows:

While cases may be pending in our appellate  
courts which may change the current law,

this Court finds the cases and statutes cited by defendant Gerald Dearing to be persuasive and accordingly his motion for Summary Judgment is granted as to plaintiff's first amended complaint and as to the Guardian Ad Litem's cross-complaint.

A COPY OF THIS ORDER IS SENT VIA U.S. MAIL

THIS DATE TO THE FOLLOWING:

JOEL AARONSON & VALEIR VANAMAN  
14001 VENTURA BLVD.  
SHERMAN OAKS, CA 91423

GLEN H. SCHWARTZ  
16027 VENTURA BLVD. 4TH FL.  
ENCINO, CA. 91436

LARRY HOFFMAN  
3660 WILSHIRE BLVD. STE. 11  
LOS ANGELES, CA 90010

NOTICE OF MOTION TO QUASH AND DISMISS AN  
ORDER TO SHOW CAUSE FILED DEC 11 1985

---

GLEN H. SCHWARTZ, A LAW CORPORATION  
LARRY HOFFMAN, ATTORNEY AT LAW  
16130 VENTURA BLVD., SUITE 650  
ENCINO, CALIFORNIA 91436  
(818) 995-3266

Attorney for GERALD DEARING AND CAROLE  
SINGLETON-DEARING

---

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
111 NO. Hill Street  
Los Angeles, California 90012  
CENTRAL DISTRICT

---

Plaintiff: MICHAEL HIRSCHENSOHN

Defendant: CAROLE SINGLETON-DEARING et al.

---

NOTICE OF MOTION ☒ OTHER (specify):

TO QUASH AND DISMISS AN ORDER TO SHOW

CAUSE SET FOR HEARING DECEMBER 10, 1985.

1. TO: PLAINTIFF MICHAEL HIRSCHENSOHN,  
GUARDIAN AD LITEM ELLEN SHEAR, Atty

2. A hearing on this motion...will be held

...

a. 12-30-85 at 9:30 AM in dept. 2D rm.:243

b. Address of court ☒ same as noted above

3. Supporting attachments

. . .

d. ☒ Points and authorities

e. [x] Other (specify):

Declaration of GERALD DEARING and  
Declaration of CAROLE SINGLETON-  
DEARING.

LARRY HOFFMAN

/s/

ORDER SHORTENING TIME

4. [x] Time [x] service [x] hearing is  
shortened. Service shall be on or before  
12/12/85 and Filed 12/26/85 at 12:00 noon.  
RESPONSIVE PAPERS TO BE SERVED. The OSC  
filed by counsel for the minor child is  
continued from 12/20/85 to 1/3/86. Should  
said OSC not be dismissed or stayed, Defen-  
dant and Claimant are ordered to produce  
the child for conciliation court and con-  
ference with L.E. Shear on 1/3/86.

/s/

Robert A. Schnider  
Judge Pro Tem

Minutes Entered DEC 30 1985/County Clerk

No File

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2D

Date: DEC 30 1985

HONORABLE KENNETH BLACK JUDGE PRO TEM

302 L. FLORES Deputy Sheriff

V. SMITH Deputy Clerk

C. K. BELL Reporter

---

0930AM

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON DEARING, CAROLE-ET AL

Respondent

Counsel for Petitioner: J.AARONSON (X)

MINOR ATTY.: L.E.SHEAR (X)

Counsel for Respondent SCHWARTZ-HOFFMAN(X)

---

NATURE OF PROCEEDINGS.

MOTION OF RESPONDENT FILED DEC. 11,

1985 TO QUASH AND DISMISS AN ORDER

TO SHOW CAUSE SET FOR HEARING

DECEMBER 20, 1985

Confidential

It is stipulated that Commissioner Black  
may hear this matter as a Judge Pro Tem.

Respondent's motion is continued to January 22, 1986 at 9:30 a.m. in Department 2D, for point and authorities on the issue of power of this Court granting visitation pending Appeal.

Counsel for the minor and plaintiff pleading must be filed and hand delivered by January 10, 1986. Pleading for defendant must be filed and served by January 17, 1986. All other orders are to remain in full force and effect.

The OSC set for January 3, 1986 at 8:30 a.m. in Department 2, is advanced to today and continue to January 24, 1986 at 8:30 a.m. in Department 2.

Defendant to serve notice.

Confidential

Minutes Entered JAN 22 1986/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 2D

Date: JAN 22 1986

HONORABLE KENNETH BLACK JUDGE PRO TEM

303 J. TIPTON Deputy Sheriff

V. FERRELL Deputy Clerk

C. Richardson Reporter

---

0930AM

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON DEARING, CAROLE-ET AL

Respondent

Counsel for Petitioner J AARONSON X

LESLIE ELLEN SHEAR (Counsel for Minor) X

Counsel for Respondent SCHWARTZ-HOFFMAN X

---

NATURE OF PROCEEDINGS.

MOTION OF RESPONDENT FILED DEC. 11,

1985 TO QUASH AND DISMISS AN ORDER

TO SHOW CAUSE SET FOR HEARING DEC.

20, 1986 (1ST CONT.)

Confidential

Matter is called for hearing.

It is stipulated that Kenneth A. Black

may hear this matter sitting as Judge

Pro Tem.

A-67

Matter is argued and submitted.

The court takes the matter under submission.

LATER: The court having taken this matter under submission this date now

Confidential makes the following ruling:

Defendant's motion to quash and dismiss OSC is denied.

Counsel notified by U.S. mail this date as follows:

LESLIE ELLEN SHEAR  
FURIO AND PLASKOW  
5850 Canoga Ave., Ste. 400  
Woodland Hills, CA 91367

GLEN H. SCHWARTZ  
LARRY HOFFMAN  
16130 Ventura Blvd., Ste. 650  
Encino, CA 91436

NEWMAN-AARONSON-KREKORIAN-VANAMAN  
JOEL S. AARONSON  
14001 Ventura Blvd.  
Sherman Oaks, CA 91423

Minutes Entered JAN 24 1986/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 2

Date: JAN 24 1986

HONORABLE STEPHEN M. LACHS JUDGE

J. CARRILLO Deputy Sheriff

SCHWARTZ-PDL-MC Deputy Clerk

D. SALYER Reporter

---

CF 022 753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Petitioner

and

SINGLETON, DEARING, CAROL et al

Respondent

Counsel for Petitioner J. AARONSON (x)

LESLIE E. SHEAR, for minor (x)

Counsel for Respondent SCHWARTZ & HOFFMAN (x)

---

NATURE OF PROCEEDINGS...

. . .

5. The matter is continued to 3/24/86

in Dept. 2 at 8:30AM

. . .

13. [x] Counsel for MINOR is directed to

prepare the order and submit it to

the court for signature and filing

[x] after signed approval as to

form and content by counsel for

Confidential

Respondent/Petitioner.

. . .

32. [x] OTHER

Confidential

Mr. and Mrs. Dearing and Mr.

Hirschensohn are to cooperate with  
the Mental Health professionals by  
making themselves available, and in  
making Victoria available.

Minutes Entered MAY 6, 1986/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - Dept. LA 2

Date: MAY 6, 1986

HONORABLE STEPHEN M. LACHS JUDGE

J. CARRILLO Deputy Sheriff

E. SCHWARTZ-MC Deputy Clerk

None Reporter

---

CF 22753 In RE the marriage of

HIRSCHENSOHN, MICHAEL Plaintiff

and

SINGLETON, DEARING CARL Defendant

Counsel for Petitioner J AARONSON

Counsel for Respondent LESLIE E. SHEAR,  
FOR MINOR  
SCHWARTZ & HOFFMAN

---

NATURE OF PROCEEDINGS:

SUBMITTED MATTER

The Court orders that a transcript of the January 24, 1986 session be prepared by the Court Reporter. Defendant is ordered to pay the cost of such transcript within ten (10) days. Upon receipt of the transcript, the Court shall take the question of which order is proper under submission.

cc: Leslie Ellen Shear  
BLEDSTEIN, LAUBER & WIRE  
15915 Ventura Blvd., Suite 203  
Encino, CA 91436

Glen Schwartz, Esq.  
16130 Ventura Blvd., Suite 650  
Encino, CA 91436

Joel Aaronson, Esq.  
14001 Ventura Boulevard  
Sherman Oaks, CA 91423

EX PARTE APPLICATION ORDER TO SHOW CAUSE  
FILED JUN 24 1986 FRANK S. ZOLIN,  
County Clerk

By; /s/

Deputy

LESLIE ELLEN SHEAR, C.F.L.S.  
BLEDSTEIN, LAUBER & WIRE  
15915 Ventura Blvd., Suite 203  
Encino, CA 91436  
(213) 872-1902

Attorney For (NAME)

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
111 N. Hill St.  
Los Angeles, CA 90012  
Central District

MARRIAGE OF

Plaintiff: MICHAEL HIRSCHENSOHN

Defendant: CAROLE SINGLETON, ET. AL

EX PARTE APPLICATION ORDER TO SHOW CAUSE  
[x] FOR MODIFICATION [x] Attorney Fees and  
[x] Injunctive Order Costs

Case Number CF 022753

1. TO: CAROLE SINGLETON DEARING AND GERALD DEARING
2. You are ordered to appear in this court  
as follows to give any legal reason why  
the relief sought in the attached Applica-  
tion should not be granted

a. date: 6-24-86 time: 1:30 PM Dept.8

Rm. 245

b. Address of court: 111 N. Hill St.  
Los Angeles, CA  
90012

3. . . .

. . .

c. ☐ Other (specify); YOU ARE ORDERED  
TO CONTACT DR. ROBIN DRAPKIN UPON SERVICE  
OF THIS ORDER TO SCHEDULE AN APPOINTMENT  
FOR HER TO ASSIST THE MINOR CHILD'S ATTOR-  
NEY AND GUARDIAN AD LITEM IN CONSULTING WITH  
THE MINOR CHILD. YOU ARE ORDERED TO PRODUCE  
THE MINOR CHILD AT THE TIME AND PLACE AGREED  
TO BY DR. DRAPKIN. IF THIS ORDER IS SERVED  
BY 10 a.m. ON JUNE 26, 1986 SAID APPOINTMENT  
SHALL BE SCHEDULED FOR JUNE 26, 1986 BETWEEN  
THE HOURS OF 8 a.m. and 3 p.m. OTHERWISE,  
THE APPOINTMENT SHALL BE SCHEDULED FOR THE  
EARLIEST DATE OPEN ON DR. DRAPKIN'S SCHEDULE,  
AND THE SCHEDULE OF THE GUARDIAN AD LITEM.

DATED: JUNE 24 1986 /s/

Judge of the Superior  
Court JOHN W. DICKEY  
Judge Pro Tem

A-74

Letter from CHAMBERS OF SUPERIOR COURT,  
Stephen M. Lachs, Supervising Judge to  
Leslie Shear, Atty. at Law, DATED  
AUG 1 1986

---

August 1, 1986

Leslie Shear  
Attorney at Law  
Bledstein, Lauber & Wine  
15915 Ventura Boulevard  
Encino, California 91436

Re: Hirschensohn v. Singleton, CF 22753

Dear Ms. Shear:

As you may remember, when this case appeared in Department 2 on July 16th I indicated I would call Dr. Lecker and speak with him concerning the evaluation. As I later informed you, the number you gave me was that of a hot line and I left my name and a message for him to call me on that hot line machine. I understand you did the same. Finally, on July 31st, I received a call from Dr. Lecker in which he indicated he had been hospitalized and was in no

condition to proceed with the evaluation.

I would suggest that the parties involved select another person to do this evaluation as soon as possible and I would be glad to help to the extent that I can in making sure that this is done in an expeditious manner.

Very truly yours,

/s/ -

Stephen M. Lachs  
Supervising Judge

SML/sc

cc: Joel Aaronson, Esq.  
Glen H. Schwartz, Esq.  
Larry Hoffman, Esq.

Minutes Entered MAR 4 1987/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. LA 2

Date: MAR. 4 1987

HONORABLE FRANCES ROTHSCCHILD JUDGE

HONORABLE ROBERT A. SCHNIDER JUDGE PRO TEM

L. FLORES Deputy Sheriff

F. PALUMBO Deputy Clerk

Yvonne Engholm-CSS Reporter

---

1:30PM

CF 22753 In RE the marriage of

MICHAEL HERISHENSOHN (x) Plaintiff

and

CAROLE SINGLETON N/A Defendant

Counsel for Plaintiff: JOEL AARONSON (X)

LESLIE SHEAR (X) on behalf of the minor  
child

Counsel for Defendant: GLEN SCHWARTZ (X)

representing Gerald Dearing

LARRY HOFFMAN (X)

representing the defendant

Carole Singleton

---

NATURE OF PROCEEDINGS [x] Petitioner

[x] Modification of

1. [ ] ORDER OF \_\_\_\_\_ [x] Judgment

2. [x] Matter transferred from Dept. 2

is called for hearing.

3. [x] It is stipulated that Commissioner

SCHNIDER may hear this matter as

Confidential

Judge Pro Tempore, and that he or a commissioner may hear any other proceedings subject to withdrawal of stipulation by either party.

. . .

6. ☒ The matter is continued to 3/25/87 in Dept. 2 at 8:30AM. ...

. . .

33. ☐ OTHER

Counsel for the defendant makes a motion to exclude all persons who are not Courtroom personnel from the Court.

That motion is heard and granted. Counsel for the defendant makes a further motion that all persons not deputized be excluded from the courtroom. The court declines to grant that motion.

The Court indicates for the record that there has been an extensive discussion off the record as to the procedural

issues and how this matter should proceed.

The Court rules as follows:

The Plaintiff's Order to Show Cause on calendar today is continued to March 25, 1987 at 8:30 AM in Dept. 2. Notice is waived of that continued hearing, and the Court so finds.

The Court, on its own motion, shortens time for notice of motions by any party in this matter to March 12, 1987 for hearings to be set on March 24, 1987. Responsive papers to any such motions must be served and filed on or before March 19, 1987 at 12:00 noon. The Court orders that there be no further continuances of the underlying OSC. The hearing is to proceed unless it is barred by a Court order dismissing the matter or quashing the underlying OSC.

Confidential

The Court deems the prior OSC filed by the Guardian ad Litem in November of 1985 is restored to calendar for hearing on March 25, 1987. Time is also shortened for the Guardian ad Litem to file a fee motion.

The Court finds that the child in this matter is 5 years old. There is no evidence that the child has any funds.

Confidential

The Court finds that the child is indigent and fees are waived for all purposes. The Court recommends to the Supervising Judge that an all-purpose judge be appointed in this matter. The Court will communicate its recommendation directly to the Supervising Judge.

A copy of this minute order is mailed to the parties addressed as follows:

LESLIE SHEAR, ESQ.  
SHEAR & KUSHNER  
15915 Ventura Blvd.  
Suite 203  
Encino, CA 91436

JOEL AARONSON, ESQ.  
14001 Ventura Blvd.  
Sherman Oaks, CA 91423

Confidential

GLEN SCHWARTZ, ESQ.  
16130 Ventura Blvd.  
Suite 650  
Encino, CA 91436

LARRY HOFFMAN, ESQ.  
545 Ave. 26 West  
Los Angeles, CA 90065

Copy to Dept. 2.

Minutes Entered MAR 26 1987/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 60

Date: MARCH 26, 1987

HONORABLE HERBERT M. KLEIN JUDGE PRO TEM

L. SALAZAR Deputy Sheriff

C. H. JOHNSON Deputy Clerk

R. MASTRO Reporter

---

CF 22753 In RE the marriage of

MICHAEL HIRSCHENSON (X)

and

CAROLE SINGLETON

Counsel for PLAINTIFF JOEL AARONSON(X)

G. SCHWARTZ (X) representing Gerald Dearing

Counsel for DEFENDANT L. HOFFMAN (X)

L. SHEAR (X) representing minor child

---

NATURE OF PROCEEDINGS

PLAINTIFFS' ORDERS TO SHOW CAUSE

Matter is resumed from March 25, 1987 with  
counsel and parties present as before.

Plaintiff, Michael Hirschensohn, and Gerald  
Dearing are sworn and testify.

All sides rest.

The matter is argued.

The Court takes the matter under submission

Confidential

FINDINGS AND ORDERS ON ORDERS TO SHOW CAUSE  
FILED MAR 30 1987 FRANK S. ZOLIN, County  
Clerk

BY C.H. JOHNSON, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MICHAEL HIRSCHENSOHN,	)	
Plaintiff,	)	CASE NO.
	)	CF 022753
vs.	)	
CAROLE SINGLETON aka CAROLE	)	FINDINGS AND
DEARING, GERALD DEARING,	)	ORDERS ON
etc., et. al.,	)	ORDERS TO
Defendants.	)	SHOW CAUSE

AARONSON & AUERBACK

BY: JOEL S. AARONSON appeared as attorney  
for Plaintiff

BLEDSTEIN & LAUBER

BY: LESLIE ELLEN SHEAR appeared as Guardian  
ad Litem and attorney  
for the child,  
VICTORIA CAROLE  
DEARING

GLEN H. SCHWARTZ appeared as attorney  
for GERALD DEARING

LARRY M. HOFFMAN appeared as attorney  
for CAROLE SINGLETON  
DEARING

On March 25 and 26, 1987, before Herbert  
M. Klein, Judge Pro Tempore, the Court heard

the following Orders to Show Cause:

1. A Motion by the Guardian ad Litem and attorney for VICTORIA CAROLE DEARING to restore the Pendente Lite Orders permitting Plaintiff to visit with the minor child pending appeal and requesting the appointment of an expert for further psychiatric or psychological evaluation. A request to have information provided to the Guardian as to the child's whereabouts, schooling, and well-being was provided prior to the hearing and is no longer being sought.

2. Plaintiff's Order to Show Cause filed on January 22, 1987, requesting restoration of the Pendente Lite Orders for Visitation pending appeal.

During the proceedings, the Plaintiff, Defendant GERALD DEARING and witness Dr. William Laczek were sworn and testified. The Court read and considered the FAMILY EVALUATION of Dr. Norman M. Stone, based

upon an evaluation between the periods of June 8, 1984, and September 11, 1984, with said report dated September 24, 1984.

Based upon all matters of record, statements of facts by counsel, testimony of the witnesses, and declarations and pleadings, including points and authorities, the Court makes the following Findings and Orders:

That Plaintiff initially sought a Finding and Order in this proceedings, that he is the biological father of the child, VICTORIA CAROLE DEARING, born May 11, 1981.

That Defendants are Victoria's biological mother, CAROLE DEARING and Carole's husband, GERALD DEARING.

That said Defendants have denied Plaintiff's claim of paternity, alleged that Gerald is Victoria's father, and were granted a Motion for Summary Judgment by order of January 28, 1985, based upon Evidence Code, Section 621, and the case of

Vincent B. vs. Joan R., 126 Cal.App.3d 619.

Said Judgment found that Gerald Dearing is Victoria's father.

That in conjunction with granting of the Motion for Summary Judgment, the Court terminated the Pendente Lite Orders for Visitation which had previously been awarded to Plaintiff.

That Plaintiff and the Guardian ad Litem have filed an appeal from the Summary Judgment which the parties estimate may not be resolved within the next three (3) to six (6) months.

That Counsel for Plaintiff stated that if the pending appeal is not resolved in favor of Plaintiff, he will seek further appellate review.

That Plaintiff and the Guardian ad Litem request an order, pursuant to CCP Section 917.7, to permit visitation between Plaintiff and the child pending the appeal.

That the Family Evaluation of Dr. Stone dated September 24, 1984, wa completed before legal determination of paternity, to wit: that on January 28, 1985, the Court ruled that paternity of the minor child was granted pursuant to Evidence Code, Section 621, and the case entitled Vincent B. vs. Joan R., 126 Cal.App.3d, 619; that in accordance with said Judgment, it was ordered, adjudged and decreed that Defendant Gerald Dearing is the father of Victoria Carole Dearing, born May 11, 1981.

That Dr. Stone recommended that Plaintiff be recognized as the legal parent of Victoria and contemplated a visitation schedule based upon Plaintiff's status as a legal parent.

That Dr. William Laczek testified that he last saw the child Victoria on two (2) separate occasions in December, 1984 when she was age 3; that he believes it would be in the best interests of the child that

Plaintiff be permitted to visit; that he never spoke with Mr. and Mrs. Dearing in reaching his opinion.

That the Plaintiff's physical contacts with the minor child since October 1984 consist of a Saturday and Sunday in November 1984 together with psychologist Robin Drabkin; an additional Saturday and Sunday in mid-1984; a Saturday and Sunday during the second week of January, 1985; telephone conversations with the child in February and March of 1985; and no physical or further contact after April, 1985 except for a brief contact in June, 1986 which appeared to last not more than ten (10) or fifteen (15) minutes when he spoke to the child while she was playing on the beach in Playa del Rey; in summary, the Plaintiff has had minimal contact with the child for approximately two (2) years since the child was three (3) years old.

That Plaintiff continues to allege that he is the child's father. During the hearing, he testified, "I am her father. I can give her nurturing and love in a normal father-daughter relationship." Plaintiff also testified "I think it is in the best interest of the child to know her true father. I can't answer if she has been tainted by this. She is my child and I am doing everything I can to bring this out."

That Plaintiff's request for visitation is based on his insistence that he is the biological father, despite the conclusive presumption of Evidence Code, Section 621, which establishes that Gerald Dearing is the child's father as a matter of substantive law. As stated in Vincent B. Vs. Joan R., at p. 623: "The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy ...

that the integrity of the family unit should not be impugned."

That pursuant to the Judgment and the Findings of the Court, Plaintiff is not a legal parent, and is entitled to visitation with the child pursuant to the second sentence in Civil Code, Section 4601. Said Section states "reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the Court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."

That based upon the above findings, inter alia, the Court finds and concludes that, at the present time, it is not in the best interests of the child that the Plaintiff have visitation. The Court believes that the existence of two (2) "fathers" as

male authority figures will confuse the child and be counter-productive to her best interests.

That the two-father concept suggested by Plaintiff also violates the intention of the Legislature by impugning the integrity of the family unit, consisting of the legal parents and the child. The parents are opposed to Plaintiff's visitation with the child and visitation would interfere with the parent-child relationship between the Dearings, as parents, and the child.

That it is premature to reintroduce the Plaintiff into the child's life, until there is a final resolution of the issues regarding paternity, as determined by the Summary Judgment.

The Court is mindful of the fact that the Plaintiff is attempting to challenge the legality, if not the Constitutionality, of Evidence Code, Section 621, which

conclusively found and ordered that Gerald Dearing is the father of the child. If Plaintiff's challenge is successful, then he is entitled to reasonable visitation pursuant to the first sentence in Civil Code, Section 4601.

In conclusion, the Court finds that it is not in the best interests of the child that visitation with Plaintiff be reinstated at this time, nor does the Court find that it is necessary to have additional psychological or psychiatric expert evaluation to assist the Court.

THEREFORE, Plaintiff's and the Guardians' Motions are both denied.

The Clerk of Department 60 is directed to mail a copy of these Findings and Orders to the attorneys for all parties.

Dated: March 30, 1987

/s/

HERBERT M. KLEIN  
Judge Pro Tempore

A-92

Minutes Entered 4-1-87/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 60

Date: APRIL 1, 1987

HONORABLE HERBERT M. KLEIN JUDGE PRO TEM

NONE Deputy Sheriff

C. H. JOHNSON Deputy Clerk

NONE Reporter

---

CF 022753

MICHAEL HIRSCHENSOHN

v.

CAROLE SINGLETON aka CAROLE  
DEARING, GERALD DEARING

Counsel for Plaintiff AARONSON & AUERBACK  
BY: JOEL S. AARONSON

Counsel for Defendant LARRY M. HOFFMAN  
GLEN H. SCHWARTZ

Guardian ad Litem LESLIE E. SHEAR

---

NATURE OF PROCEEDINGS:

FINDINGS AND ORDERS ON ORDERS TO  
SHOW CAUSE

Confidential | In the matter heretofore submitted on  
March 26, 1987, the Court rules in  
accordance with its Findings and Orders  
on Orders to Show Cause signed and filed  
March 30, 1987.

A copy of the within minute order and  
Findings and Orders is sent to counsel

of record via United States Mail addressed as follows:

Newman, Aaronson, Krekorian & Vanaman  
Joel S. Aaronson  
14001 Ventura Boulevard  
Sherman Oaks, California 91423

Shear & Kushner  
Leslie E. Shear  
15915 Ventura Boulevard, Suite 203  
Encino, California 91436

Glen H. Schwartz  
Attorney at Law  
16130 Ventura Boulevard  
Suite 650  
Encino, California 91436

Larry Hoffman  
Attorney at Law  
545 Avenue 26 West  
Suite 201  
Los Angeles, California 90065

Confidential

Minutes Entered 4-6-87/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES - DEPT. 60

Date: APRIL 6, 1987

HONORABLE HERBERT M. KLEIN JUDGE PRO TEM

NONE Deputy Sheriff

C. H. JOHNSON Deputy Clerk

NONE Reporter

---

CF 022 753

MICHAEL HIRSCHENSOHN

vs

CAROLE SINGLETON aka

CAROLE DEARING, GERALD DEARING

Counsel for Plaintiff JOEL S. AARONSON

Counsel for Defendant LARRY M. HOFFMAN

GLEN SCHWARTZ

Guardian ad Litem

LESLIE SHEAR

---

NATURE OF PROCEEDINGS:

OBJECTION TO SUBMITTED MATERIAL,  
FAM LAW

Pursuant to letter from attorney Larry M. Hoffman, dated March 31, 1987, please be advised that the Court completed and signed its Findings and Orders prior to receipt of the material submitted by attorney Leslie Shear. Therefore, said material was not considered by the Court in reaching its decision.

Confidential

A copy of this order mailed to each -  
attorney via United States Mail.

Minutes Entered SEP. 1 1987/County Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: SEP. 1 1987

HONORABLE FRANCIS ROTHSCHILD JUDGE

HONORABLE MADELINE BLIER JUDGE PRO TEM

L. W. WATTS Deputy Sheriff

E. SCHWARTS County Clerk

W. BURTON - Dept. 43

R. EVANKO Reporter

---

CF 22753 In RE the matter of

MICHAEL HIRSCHENSOHN (NA) PLAINTIFF

and

CAROLE SINGLETON (NA) DEFENDANT

Counsel for Plaintiff: JOEL AARONSON (NA)

Counsel for Defendant: LARRY M. HOFFMAN (NA)

Counsel for Minor: LESLIE ELLEN SHEAR (X)

---

NATURE OF PROCEEDINGS

[x] PETITIONER [x] CUSTODY, SUPPORT  
FEES, ETC.

. . .

2. [x] Matter transferred from Dept. 2

is called for hearing.

. . .

8. ... [x] Leslie Ellen Shear is sworn

and testify(ies).

. . .

Confidential

13. [x] Counsel for the minor is directed to prepare the order and submit it to the court for signature and filing. Order is due 9-4-87, with proof of service. If no objections to the order are submitted, the Court will sign the order on 9-21-87.

The Court takes judicial notice of the minute order dated 3-4-87 and of the FINDINGS & ORDERS ON ORDERS TO SHOW CAUSE filed 3-30-87. Minor's Attorney Exhibit 1 (8 pages of fee charges for hours worked dated 3-24-87) is received in evidence. The Court indicates that the defendant and Gerald Dearing had previously been ordered to submit (illeg.) and Expense Declarations and to this date, none have been submitted nor has counsel for the minor received a copy of said declaration. Carol Singleton, aka Carole

Confidential

Confidential

Singleton Dearing and Gerald Dearing are each ordered to pay to counsel for the the minor as their (illeg.)<sup>1</sup> share of the minor's attorney fees and costs, the sum of \$5,000.00 each FORTHWITH. This order is effective FORTHWITH.

ORDER DENYING REVIEW SUPREME COURT  
FILED JUL 30 1987 Laurence P. Gill, Clerk

O R D E R D E N Y I N G R E V I E W  
AFTER JUDGMENT BY THE COURT OF APPEAL  
2nd District, Division 3, No.B015384  
S001251

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA  
IN BANK

---

MICHAEL H., Appellant,

v.

GERALD D., Respondent;  
VICTORIA D., Appellant.

---

Appellants' petition for review DENIED.

(PANELLI)  

---

Acting Chief Justice

A-100

AFFIDAVIT OF MAILING

STATE OF CALIFORNIA       )  
                                  )ss.  
COUNTY OF LOS ANGELES    )

Valerie Vanaman, being duly sworn, deposes and says:

I am admitted to practice before the Supreme Court of the United States of America.

I have personally reviewed the receipts for certified mail obtained by the printer, Publishing and Graphic Electronic Services, Incorporated (Pages), whereon is stamped the date of October 28, 1987, United States Postal Service, Los Angeles, California. Said receipts affixed with the date of October 28, 1987 were sent to:

Clerk,	Gerald Dearing
U. S. Supreme Court	278 11th St.
One First St., N.E.	Apt. "A"
Washington, D.C. 20543	New York, NY 10014
(Original + 40 copies)(3 copies)	

Leslie Shear	Larry Hoffman
5850 Canoga Ave.	3660 Wilshire Blvd.
Suite 400	Suite 1150
Woodland Hills, CA	Los Angeles, CA 90010
91367	(3 copies)
(3 copies)	

Patricia Erickson      Michael Oddenino  
Paul Hoffman          199 S. Los Robles Ave.  
A.C.L.U.               Suite 711  
633 S. Shatto Place    Pasadena, CA 91101  
Los Angeles, CA 90005 (3 copies)  
(3 copies)

National Council for Childrens Rights  
2001 "O" Street, N.W.  
Washington, D.C. 20036  
(3 copies)

The above statements are true to my  
knowledge, information and belief. Further  
affiant sayeth naught.

/s/  
VALERIE VANAMAN

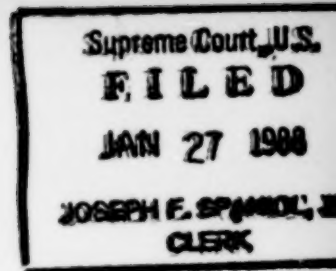
Subscribed and sworn to before me the under-  
signed notary public, this 18th day of  
November, 1987, at Los Angeles, California.

/s/  
NOTARY PUBLIC FOR THE STATE  
OF CALIFORNIA, COUNTY OF  
LOS ANGELES

(seal)

OFFICIAL SEAL  
MARY FRANCES McHUGH-  
Notary Public-California  
Los Angeles-County  
My Comm. Expires Dec.15,1989

my commission expires: 12-15-89



3

No. 87-746

**SUPREME COURT  
of the  
UNITED STATES  
October Term, 1987**

MICHAEL H. and VICTORIA D.,  
a minor by and through her  
guardian ad litem, LESLIE SHEAR,

Appellants,

vs.

GERALD D.,

Appellee.

On Appeal from the Court of Appeal  
State of California  
Second Appellate District

**MOTION TO DISMISS OR AFFIRM**

GERALD DEARING  
278 11th Street  
Apt. A  
New York, N.Y. 10014  
(212) 691-9848  
Appellee, Pro Se

127

**TOPICAL INDEX**

INTRODUCTION ..... 2

STATE STATUTE INVOLVED..... 2

ARGUMENT..... 3

1. Due Process ..... 3

2. Equal Protection ..... 7

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

CASES: PAGES:

Hicks v. Miranda	
(1975) 422 US 332, 344.....	7
In re Marriage of B.	
(1981) 124 Cal.App.3d 524, 529-530.....	4
In re Michelle W.	
(1985) 39 C3d 354.....	6
Kusior v. Silva	
(1960) 54 C2d 603, 619.....	4
Lehr v. Robertson	
(1983) 463 US 248.....	6
Michelle W. v. Riley	
(1986) 474 US 1043.....	6
Vincent B. v. Joan R.	
(1981) 126 Cal.App.3d 619.....	5

CODES: PAGES:

### CALIFORNIA EVIDENCE CODE

Subdivision (a) §621 .....	2, 3, 4
Subdivision (b).....	2
Subdivision (c).....	2
Subdivision (d).....	2

TEXTS: PAGES:

Jurisdictional Statement.....	3
-------------------------------	---

No. 87-746

## SUPREME COURT OF THE UNITED STATES October Term, 1987

MICHAEL H. and VICTORIA D.,  
a minor by and through her  
guardian ad litem, LESLIE SHEAR,

Appellants,

vs.

GERALD D.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

**MOTION TO DISMISS OR AFFIRM**

## INTRODUCTION

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second Appellate District on the ground that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

## STATE STATUTE INVOLVED

**Subdivision (a) of the California Evidence Code §621**, like the law in many states, creates a presumption that a man is the father of children conceived by his wife during their marriage. What sets the law apart and brings it to this Court are its provisions that restrict the interested parties from offering evidence to rebut the presumption; under **subdivisions (b), (c), and (d)**, the presumption may be rebutted by blood test evidence but only by the husband or by the mother.<sup>1</sup> In this case, the statute was invoked by the husband to terminate a proceeding in which it was alleged that a child of the marriage was the product of the mother's extra-

(1) The statute also limits the right of the mother and husband to dispute the presumption: the mother's right is conditioned upon the filing with the court of an affidavit of the child's biological father acknowledging paternity, and neither mother nor husband may offer rebuttal evidence after the child attains the age of two years.

marital affair. Appellants, the putative father and the independent guardian ad litem appointed by the Trial Court to represent the interests of the child, contend here, as they did unsuccessfully below, that application of the statute denied them their rights under the United States Constitution because (1) the statute serves no legitimate state interest so significant that it outweighs the right of appellants to prove the facts of biological paternity, and (2) the statute draws an impermissible gender-based distinction between married women and the men with whom they have adulterous affairs, in that the mother has the right (limited though it may be) to offer evidence rebutting the presumption, while the presumption is conclusive as to the putative father (**Jurisdictional Statement**, pages 25-26).

## ARGUMENT

### 1. Due Process

**Section 621** does not purport to factually determine the biological paternity of a child, and it is not a rule designed for the orderly administration of judicial proceedings; rather, despite its placement in the **Evidence Code**, it is "a substantive rule of

law based upon a determination by the Legislature as a matter of overriding social policy", **Kusior v. Silver** (1960) 54 C2d 603, 619. Like the rule which excludes from criminal actions evidence illegally obtained by the police, **California Evidence Code §621** sacrifices relevant evidence to serve an interest deemed more significant than ascertaining the "truth" in a court of law. Among the state's interests promoted by application of the statute, as identified in California case law, include protection of the integrity of the matrimonial family and preservation of its privacy, **Kusior v. Silva**, supra, 54 C2d 603, 619, and protecting the child from the social stigma of illegitimacy, **In re Marriage of B.** (1981) 124 Cal.App.3d 524, 529-530.

As they must, Appellants recognize that application of the statute in the case at bar served those purposes; Appellee's marriage to the mother endures, and they currently reside as a family with Victoria D., who is six and a half, and their baby boy, now eleven months old. Rather, Appellants suggest that the time has come to abandon the nuclear family as a model, and to strip the institution of its favored treatment under the law (**Jurisdictional Statement**, page 15); for Appellants, the due process question in this appeal is whether the state's interest in protecting the matrimonial family is suffi-

ciently significant to override Michael's and Victoria's professed rights to prove their biological connection in a court of law.

Both the Trial Court and Court of Appeal had little difficulty in answering that question in the affirmative. For both courts, the result in this case was compelled by the decision in the earlier case of **Vincent B. vs. Joan R.** (1981) 126 Cal.App.3d 619, where the California Court of Appeal affirmed a judgment dismissing the paternity action brought by the putative father. In that case, the putative father's interest in proving paternity was far more substantial than Michael's; whereas Michael claims to have developed a parent-child relationship with Victoria during periods when he cohabited with the mother (for three months before Victoria's first birthday and for eight months before her third birthday), application of the statute in **Vincent B.** terminated a life-long relationship between the putative father and his seven year old child. On the other hand, the state's interest in application of the statute in **Vincent B.** was far less significant than its interest in the case at bar, while the mother and husband in **Vincent B.** had been divorced, and there was no existing marital family to protect, the marriage of Carole and Gerald flourishes, and the family now includes another child.

This Court, too, may comfortably rely upon precedent in summarily disposing of Appellants' claims. In **Lehr v. Robertson** (1983) 463 US 248, this Court recognized the continuing importance of the matrimonial family and the legitimacy of the states' interest in preserving and protecting it.<sup>2</sup> Moreover, **Vincent B.** was appealed to this Court, and the appeal was dismissed for failure to raise a substantial federal question, **Vincent B. v. Joan R.** (1982) 459 US 807. This Court has, for the same reason, also dismissed appeals from the judgment of the California Supreme Court in two more recent cases rejecting equal protection and due process challenges to application of the conclusive presumption, **Estate of Cornelious** (1983) 35 C3d 461, app. dism. (1984) 466 US 967 (where the decedent's heirs invoked the statute to protect their inheritance from a woman claiming to be decedent's daughter but whose mother had been married to another man) and **In re Michelle W.** (1985) 39 C3d 354, app. dism. sub. nom. **Michelle W. v. Riley** (1986) 474 US 1043 (where the statute was in-

(2) "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family," **Lehr v. Robertson**, 463 US, at 257.

voked by the husband to defeat the claims of the putative father and child even though the mother had dissolved her marriage to the husband and married the putative father). An order of this Court dismissing an appeal constitutes a disposition of the case on its merits and carries the effect of **stare decisis**, **Hicks v. Miranda** (1975) 422 US 332, 344.

## 2. Equal Protection

Appellants contend that the statute denies the putative father equal protection because it invidiously discriminates on the basis of sex against a man who has an affair with a married woman since the woman may, but the man may not, offer evidence in judicial proceedings to establish that the man, and not the woman's husband, fathered the woman's child. Appellants are simply wrong; the statute does not afford different treatment to the mother and the putative father. To assure that the child will not be left fatherless, the law allows the mother to offer rebutting evidence only if she first obtains the putative father's acknowledgement of paternity; thus, the mother may offer evidence to

rebut the presumption if, and only if, the putative father joins her efforts to challenge the husband's claim of paternity. The effect of the requirement that the putative father cooperate with the mother is that the mother's right to dispute the presumption is coextensive with the putative father's.

### CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the California Court of Appeal.

Respectfully submitted,

GERALD DEARING  
Appellee, Pro Se

### PROOF OF SERVICE

STATE OF CALIFORNIA )

) ss:

COUNTY OF RIVERSIDE )

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9016 Mission Boulevard, Riverside, California 92509.

On February 29, 1988, I served the within MOTION TO DISMISS OR AFFIRM on the interested parties in said action, by placing a true copy in each of five (5) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk, Court of Appeal	Clerk of Superior Court
2nd Appellate District	County of Los Angeles
3580 Wilshire Blvd.	111 North Hill Street
Los Angeles, CA 90010	Los Angeles, Ca 90010
Valerie Vanaman	Patricia Erickson
Newman, Aaronson, Krekorian	Paul Hoffman
& Vanaman	ACLU
14001 Ventura Blvd.	633 S. Shatto Place
Sherman Oaks, CA 91423	Los Angeles, CA 90005

Michael Oddenino  
199 S. Los Robles Avenue  
Suite 711  
Pasadena, CA 91101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on February 29, 1988, at Riverside,  
California.

---

JACK GALLAGHER

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

MICHAEL H.,

and

*Appellant,*

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,

v.

*Appellant,*

GERALD D.,

*Appellee.*

On Appeal from the Supreme Court of California

JOINT APPENDIX

ROBERT A.W. BORAKS  
(Counsel of Record)

BORAKS & LECKAR  
1818 N Street, N.W.  
Washington, D.C. 20036  
(202) 785-3240

GEORGE KAUFMANN  
RONALD K. HENRY  
PAUL R. TASKIER  
DICKSTEIN, SHAPIRO & MORIN  
2101 L Street, N.W.  
Washington, D.C. 20037  
(202) 785-9700

*Attorneys for Appellant  
Michael H.*

LESLIE SHEAR  
(Counsel of Record)  
SHEAR & KUSHNER  
15915 Ventura Boulevard  
Suite 203  
Encino, California 91436  
(213) 872-1902

*Counsel for Appellant Victoria D.*

LARRY HOFFMAN  
(Counsel of Record)  
545 Avenue 26 West  
Suite 201  
Los Angeles, California 90065  
(213) 225-1432

GLEN SCHWARTZ  
(Counsel of Record)  
16130 Ventura Boulevard  
Suite 650  
Encino, California 91436  
(818) 995-3266  
*Counsel for Appellee*

## JOINT APPENDIX

### TABLE OF CONTENTS

<i>Document</i>	<i>Page</i>
1. Declaration of Gerald Dearing In Support of Motion Re: Summary Judgment And For Protective Orders .....	1
2. Affidavit Of Carole Singleton Dearing In Support Of Motion Re: Summary Judgment And For Protective Orders .....	5
3. First Amended Complaint To Establish Paternity And To Establish Father/Child Relationship.....	9
4. Cross-Complaint For Declaratory Relief, To Establish Father/Child Relationship .....	14
5. Declaration Of Carole Singleton Dearing .....	17
6. Declaration of Michael Hirschensohn .....	21
7. 4/2/84 Letter Larry M. Hoffman to Joel Aaronson .....	23
8. 5/7/84 Letter Joel Aaronson to Larry Hoffman....	25
9. Answer Of Gerald Dearing To First Amended Complaint .....	27
10. Answer Of Gerald Dearing To Cross-Complaint For Declaratory Relief, To Establish Paternity And To Establish Father/Child Relationship.....	29
11. 10/4/84 Order of Sandoz, J. ....	32
12. Declaration of Norman Stone .....	33
13. Affidavit of Gerald Dearing .....	35
14. Affidavit of Carole Singleton Dearing .....	38
15. Family Evaluation .....	41
16. Declaration of Michael Hirschensohn .....	73
17. Stipulation For Judgment .....	83
18. Judgment .....	86

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

---

No. CF 022753

MICHAEL HERSCHENSOHN,  
*Plaintiff,*

vs.

CAROLE SINGLETON, ETC., *et al.,*  
*Defendants.*

---

[Filed April 6, 1983]

---

**DECLARATION OF GERALD DEARING**

I, GERALD DEARING, declare:

I am the husband of CAROLE SINGLETON DEARING. We were married on May 9, 1976, at Las Vegas, Nevada. We resided together for several months before our marriage, first in Paris, France and then in Playa Del Rey, California. Except for periods of separation necessitated by our careers, we resided together continuously from the date of our marriage until October 1981. During the period June 1980 through October 1980, we resided together continuously without any separation at 6401 Ocean Front Walk, Playa Del Rey, California.

CAROLE and I engaged regularly in sexual intercourse during September 1980. I am not now impotent nor sterile, nor have I ever been. I have never been told by anyone that I was or could be impotent or sterile, nor have I told anyone that I was, or though I might be, impotent or sterile. In addition to the pregnancies of my

wife for which I am biologically responsible as stated in her affidavit, a former girlfriend, GERDA EHRADT, and I conceived a child in 1969 or 1970; this pregnancy was terminated by a therapeutic abortion.

From April 1981 through October 1981, CAROLE and I resided together continuously without separation at the Playa Del Rey residence. Prior to VICTORIA'S birth in May 1981, CAROLE and I attended La Maz classes. I was with CAROLE in the delivery room when VICTORIA was born one month premature by Cesarean Section. At birth, VICTORIA suffered from a collapsed lung and was on the critical list for the first 24 hours of her life; I remained at the hospital throughout the ordeal. CAROLE and VICTORIA returned home with me five days after VICTORIA was born. During her first ten days at home, while CAROLE recuperated from the operation, I had primary responsibility for care of VICTORIA. When VICTORIA was one month old, my parents came to Los Angeles from France and stayed for two weeks. That summer, my brother HUGO also visited us in Los Angeles. In July, 1981, our landlord and CAROLE's close friend, SHERMAN GREENBERG, became ill with cancer. For the next two or three months, CAROLE spent most of her time caring for Mr. Greenberg. On those occasions, again, I happily exercised primary responsibility for VICTORIA'S care.

CAROLE and I separated in October 1981. When I was required for business reasons to return to New York (where I was and now am employed as a Vice-President and United States representative of ST Corporation, a French Oil Company). CAROLE decided against my wishes not to accompany me and I reluctantly agreed that she and VICTORIA would remain in Los Angeles. This was the first occasion since my marriage to CAROLE that we separated for reasons other than career requirements. Although I was unaware of it at the time, I now believe that my marital difficulties and my

separation from CAROLE and VICTORIA were due to the extra marital affair CAROLE secretly engaged in with Plaintiff and the consequent emotional turmoil she suffered in reaction to Plaintiff's assertion that he, and not I, was VICTORIA'S father. I did not learn of Plaintiff's affair with my wife, or of his claim that he was biologically responsible for VICTORIA'S conception, until so advised by Plaintiffs when he called me in May 1982.

After my separation from CAROLE in October 1981, we have lived together, with VICTORIA, in New York for a month in the spring of 1982 (after I received the telephone call from Plaintiff), and for a month in the summer of 1982 (during which VICTORIA was baptized at a ceremony attended by members of my family), and in Europe for three weeks in the fall of 1982.

During my separation from CAROLE and VICTORIA, I have consistently paid for VICTORIA'S support; since VICTORIA was old enough to hold the telephone, I have communicated with her during periods of separation on the average of twice each week.

When CAROLE, VICTORIA and I returned to New York from Europe in the fall of 1982, we agreed to reconcile. CAROLE and VICTORIA returned to Los Angeles to arrange for their move to New York. For the reasons stated in CAROLE'S Affidavit, she was required to remain in Los Angeles until March 11, 1983. Since that time, CAROLE, VICTORIA and I have resided together, and we intend to continue residing together, as a family in New York City.

I believe that I am and I know that I could be biologically responsible for the conception of VICTORIA. Even if I am not, however, VICTORIA and I consider that I am her father. She calls me "papa". If CAROLE and I are permitted to go on with our lives free from interference from Plaintiff, I am confident that we can main-

tain a healthy marital relationship and create a happy and nurturing environment for VICTORIA. However, my relationship with VICTORIA does not depend upon the subsistence of my relationship with CAROLE. I will continue being VICTORIA'S father even if the marriage fails. My relationship with VICTORIA depends only upon the outcome of this litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of April, 1983, Los Angeles, California.

/s/ GD  
GERALD DEARING

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

\_\_\_\_\_  
No. CF022753

MICHAEL HERSCHENSOHN,  
vs. *Plaintiff,*  
CAROLE SINGLETON, *et al.,*  
*Defendants.*

\_\_\_\_\_  
Filed April 6, 1983  
\_\_\_\_\_

AFFIDAVIT OF CAROLE SINGLETON DEARING

STATE OF NEW YORK    )  
                                  )   SS  
COUNTY OF            )

CAROLE SINGLETON DEARING, being first duly sworn, deposes and says:

I am the mother of VICTORIA DEARING. I am married to GERALD DEARING. We were married on May 9, 1976, at Las Vegas, Nevada. He resided together several months before our marriage, first in Paris, France, and then in Plaza Del Rey, California. I am a professional model, and my career requires me to travel. Except for periods of separation necessitated by our respective careers, GERALD and I resided together continuously from the date of our marriage until October 1981. During the period of June 1980 to October 1980, and again from April 1981 through October 1981, we

resided together continuously without separation, at 6401 Oceanfront Walk, Plaza Del Rey, California.

GERALD DEARING and I engaged in intercourse on several occasions during September 1980 when VICTORIA was conceived. To my knowledge, GERALD never has been and is not now impotent or sterile, and I have never told anyone, including Plaintiff, that GERALD was or could be impotent or sterile at any time. Approximately two years before VICTORIA was born, I conceived a child as a result of intercourse with GERALD; that pregnancy was terminated by therapeutic abortion. Approximately three years before VICTORIA was born, I conceived another child as a result of intercourse with GERALD; that pregnancy terminated by a miscarriage.

Commencing in or about April 1981, GERALD and I attended La Maz classes. VICTORIA was born one month premature by Cesarean Section at Cedars of Sinai Hospital in Los Angeles. GERALD was with me in the delivery room when VICTORIA was born. She was born with a collapsed lung and for the first 24 hours of her life was on the critical list. GERALD remained with me and VICTORIA in the hospital throughout that ordeal. VICTORIA and I were released from the hospital five days after VICTORIA was born. I was bed-ridden approximately 10 days after returning home as I recuperated from the operation. During that period of time, GERALD had primary care responsibilities for VICTORIA and for me. During the summer of 1981, GERALD'S mother and father and brother visited us in Los Angeles from their home in France. In July 1981, I learned that a very dear friend and our landlord, SHERMAN GREENBERG, was dying of cancer. For several months that summer, I devoted a substantial portion of my time caring for Mr. Greenberg. On those occasions, GERALD was solely responsible for the care of VICTORIA.

In October 1981, GERALD was required to move to New York for business reasons. I elected not to accompany him. GERALD reluctantly agreed that VICTORIA and I would remain in Los Angeles, and, until such time as I might choose to join him, he would pay for VICTORIA'S support. During my separation from GERALD, he has faithfully and consistently paid for VICTORIA'S support; since before VICTORIA could speak on the telephone, he has called to speak with her on the average of twice each week. VICTORIA considers GERALD to be her father and calls him "Papa".

Since my separation from GERALD, we have lived together with VICTORIA in New York for one month in the spring of 1982 and for a month in the summer of 1982 (during which time VICTORIA was baptized at a ceremony attended by GERALD'S family), and for several weeks in Europe in the fall of 1982. By the time we returned to the United States in the fall of 1982, GERALD and I had agreed to reconcile. He remained in New York while VICTORIA and I traveled to Los Angeles to arrange for the move back to New York. In November, 1983, however, I was served with process in this proceeding. I remained in Los Angeles for the purpose of consulting with and retaining an attorney. On March 1, 1983, VICTORIA and I moved to New York where we currently reside with GERALD.

I am optimistic that my marriage to GERALD will survive the effects of this proceeding, whatever the outcome, and that GERALD, VICTORIA, and I will continue to live as a family unit. Should the attempt at reconciliation not succeed, however, I shall not have any personal relationship with Plaintiff. GERALD and VICTORIA love one another and I respectfully urge this court not to interfere with that relationship. The best interests of VICTORIA would be served by an order con-

firming that GERALD, and not Plaintiff, is the father of VICTORIA.

DATED:

/s/ Carole Singleton Dearing  
CAROLE SINGLETON DEARING

Subscribed and sworn to before me this 4th day of April 1983.

/s/ Joan Lavelle

Notary Public in and for said County and State

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

---

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff,*

vs.

CAROLE SINGLETON, aka CAROLE SINGLETON DEARING,  
and VICTORIA CAROLE DEARING, a Minor, and GERALD  
DEARING, an individual,  
*Defendants.*

---

[Filed April 11, 1983]

---

FIRST AMENDED COMPLAINT TO ESTABLISH  
PATERNITY AND TO ESTABLISH  
FATHER/CHILD RELATIONSHIP

FIRST CAUSE OF ACTION  
(Complaint to Establish Paternity)

1. Plaintiff is and at all times herein mentioned was the natural biological father of the minor child known as VICTORIA CAROLE DEARING, born May 11, 1981.

2. Defendant CAROLE SINGLETON, aka CAROLE SINGLETON DEARING, is and all times herein mentioned was a resident of the County of Los Angeles, State of California.

3. Defendant, VICTORIA CAROLE DEARING, a Minor, was born in the County of Los Angeles, State of

California, on May 11, 1981 and has continually resided with her mother since her birth.

4. In or about the summer of 1978, Plaintiff and Defendant CAROLE SINGLETON, commenced an intimate relationship. On numerous occasions thereafter, in numerous places, and most significantly, on or about September 17th and 18th, 1980, Plaintiff and Defendant, CAROLE SINGLETON, engaged in acts of sexual intercourse, and as a direct result of these acts of sexual intercourse, the child, VICTORIA, was conceived.

5. On May 11, 1981, Defendant, CAROLE SINGLETON, gave birth prematurely by approximately one month, to a female child, VICTORIA CAROLE DEARING, who was conceived as a result of the sexual intercourse between Plaintiff and Defendant CAROLE SINGLETON and as to whom CAROLE SINGLETON has precisely acknowledged that Plaintiff is the father.

6. On or about October 29, 1981, Defendant CAROLE SINGLETON voluntarily took Defendant VICTORIA CAROLE DEARING, with the Plaintiff to U.C.L.A. Medical Center for the special purpose of being tested by the U.C.L.A. HLA Tissue Typing Laboratory. It was determined that Plaintiff's probability of paternity was 98.07% (see attached report as Exhibit "A").

7. Since July, 1981, Plaintiff and Defendant have held out to the world that the child, VICTORIA, was their own. Plaintiff has, when requested and at his own instance, given money to Defendant CAROLE SINGLETON, in order that she might have funds for herself and the child VICTORIA. Further from January through March 1982, CAROLE SINGLETON and VICTORIA, lived with Plaintiff in St. Thomas, Virgin Islands and held herself out as Plaintiff's wife and held Plaintiff out as VICTORIA'S father.

8. Plaintiff is ready, willing and able to supply sufficient funds to pay reasonable sums for support, maintenance, and education for his daughter, VICTORIA.

9. Plaintiff has been diagnosed as having a unique genetic history which can be passed to his heirs, the result of which can be the birth of children with severe developmental disabilities, commonly known as Laurence Moon Biedl Syndrome. Any child of Plaintiff must have knowledge of this history to protect their own health as well as the health of any children they may have.

## SECOND CAUSE OF ACTION

(Establish Father/Child Paternity)

10. Plaintiff, hereby incorporates by reference as set out in full, Paragraphs 1 through 9 of this complaint.

11. Defendant CAROLE SINGLETON DEARING is ceremoniously married to Defendant, GERALD DEARING, whose permanent address is and at all times relevant was New York, New York

12. Plaintiff alleges upon information and belief that Defendants CAROLE SINGLETON and GERALD DEARING have separate residences and do not now, nor have they since 1980, cohabitated as man and wife. Further that Defendant GERALD DEARING is sterile and, therefore, incapable of being the father of VICTORIA.

13. Plaintiff alleges that he is the biological father of VICTORIA CAROLE DEARING and is informed and believes that Defendant GERALD DEARING is not the biological father of said child.

14. Notwithstanding prior declarations and medical evidence to the contrary, Defendant CAROLE SINGLETON now alleges that GERALD DEARING is the biological father of VICTORIA CAROLE DEARING and that Defendant GERALD DEARING has an interest in establishing his paternity of said child.

15. Plaintiff is informed and believes and upon such information alleges that scientific evidence demonstrates

that Defendant GERALD DEARING is not the biological father and that, in addition, Defendant GERALD DEARING is sterile.

16. A controversy has arisen between the parties in that Plaintiff contends that Defendant GERALD DEARING can be totally excluded on the basis of scientific evidence as the biological father of the minor child VICTORIA CAROLE DEARING and that Plaintiff has a legal-right to be declared the father of said minor child and to have a parent-child relationship with her. Defendants CAROLE SINGLETON and GERALD DEARING contend to the contrary.

17. A controversy has, therefore, arisen requiring a declaration by this Court that Plaintiff and the minor child, VICTORIA CAROLE, are entitled to all of the rights, privileges, duties, and obligations incident to the parent-child relationship including visitation, support and rights of succession.

WHEREFORE, Plaintiff prays for judgment as follows:

#### FIRST CAUSE OF ACTION

1. That the Plaintiff be adjudged to be a parent of the child, VICTORIA;

2. That Plaintiff be ordered to pay a reasonable amount each month for the support, maintenance, and education of the child;

#### SECOND CAUSE OF ACTION

3. That Plaintiff be adjudged to be VICTORIA's father;

4. That Plaintiff be awarded reasonable visitation with the child; and

#### AS TO ALL CAUSES OF ACTION

5. For such other and further relief as the Court deems just and proper.

April 1, 1983

NEWMAN, AARONSON.  
KREKORIAN. VANAMAN

By: /s/ Joel S. Aaronson  
JOEL S. AARONSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

---

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff*  
*and Cross-Defendant,*

vs.

CAROLE SINGLETON, aka  
CAROLE SINGLETON DEARING,  
*Defendant and Cross-  
Defendant*

VICTORIA CAROLE DEARING, A Minor,  
*Defendant and Cross-  
Complainant,*

GERALD DEARING,  
*Defendant and Cross-  
Defendant*

---

**CROSS-COMPLAINT FOR DECLARATORY RELIEF,  
TO ESTABLISH PATERNITY AND TO ESTABLISH  
FATHER-CHILD RELATIONSHIP**

Cross-Complainant VICTORIA CAROLE DEARING,  
a minor, by LESLIE ELLEN SHEAR, her guardian ad  
litem, alleges:

1. Cross-Complainant VICTORIA CAROLE DEARING, hereinafter referred to as VICTORIA, was born on May 11, 1981 to Defendant CAROLE SINGLETON, hereinafter referring to as SINGLETON.

2. On November 18, 1982, Defendant and Cross-Defendant MICHAEL HIRSCHENSOHN, hereinafter referred to as HIRSCHENSOHN, filed a Complaint to Establish Paternity and to Establish Father/Child Relationship, alleging that he is the biological father of VICTORIA.

3. On January 25, 1983, SINGLETON filed an Answer, alleging that GERALD DEARING, hereinafter referred to as DEARING, is the father of VICTORIA.

4. On April 4, 1983 DEARING signed a declaration under penalty of perjury alleging that he is the father of VICTORIA.

5. VICTORIA is now 23 months only and residing with SINGLETON in New York City, New York.

6. VICTORIA is entitled to care, supervision, support and rights of inheritance from her father.

7. VICTORIA is also entitled to attorneys fees and costs from all of the parties herein.

8. There is an actual controversy as to the identity of the father of VICTORIA.

9. Both HIRSCHENSOHN and DEARING have claimed that each of them has formed a psychological or *de facto* father-child relationship with VICTORIA. If VICTORIA has one or more psychological or *de facto* father(s) she is entitled to care, supervision, support and rights of inheritance from said father or father(s).

WHEREFORE, Cross-Complainant prays for:

1. A Declaration of Rights establishing whether there exists a parent-child relationship between HIRSCHENSOHN and VICTORIA;

2. A Declaration of Rights establishing whether there exists a parent-child relationship between DEARING and VICTORIA;

3. Orders allocating responsibility for her care, supervision, (custody and visitation) and support;
4. Attorneys fees and costs for this proceeding;
5. Such other and further relief as the Court deems proper.

Dated: April 12, 1983

LESLIE ELLEN SHEAR

Attorney and Guardian Ad  
Litem for Defendant and  
Cross-Complainant  
VICTORIA CAROLE  
DEARING, a minor.

# DECLARATION OF CAROLE SINGLETON DEARING

I, CAROLE SINGLETON DEARING, declare:

I am a Defendant in this action. I am the mother of VICTORIA CAROLE DEARING, born May 11, 1981. VICTORIA is a child of my marriage to GERALD DEARING. GERALD and I remain husband and wife, although we have lived separate and apart since June 1983.

For at least the past several years, Plaintiff has resided in the Virgin Islands where he owns a business and two parcels of real property, and where he currently maintains a residence. Since August 1983, he has lived with my daughter and me intermittently at my apartment located at 6407 Oceanfront Walk, Playa Del Rey. Specifically, Plaintiff used my apartment as his California residence during August 1983 and October 1983, from a few days before Christmas 1983 until the middle of January 1984, and from the second week of April until the end of April, 1984. During September 1983, Plaintiff was in New York; during November and most of December 1983, and from mid January through the 1st week of April 1984, he was in the Virgin Islands. VICTORIA and I have resided at the Playa Del Ray apartment continuously since July 1983, except for the last week in April 1984, during which time we resided in the Southern California area with my mother, awaiting Plaintiff's removal from my apartment. Plaintiff vacated the apartment on May 1, 1984; since then, VICTORIA and I have resided there alone.

During the times that VICTORIA and I have been in Plaintiff's company since August 1983, his behavior, and VICTORIA's reaction to his behavior, have been such as to convince me that my daughter's welfare, and my own welfare, require that we have no contact whatsoever with Plaintiff. From the outset, Plaintiff has been argumentative, combative, and violent, and in displaying his moody,

depressive, and peculiar behavior in front of VICTORIA, he has demonstrated disinterest in her welfare. In August, for example, he disagreed with my decision to discontinue giving VICTORIA tylenol for a fever which had abated; he resolved the dispute by grabbing VICTORIA and forcefully administering the medication. On another occasion shortly thereafter, he ordered me to remove wine glasses from a shelf, stating that VICTORIA could reach them and, if she broke one, she might hurt herself; I told Plaintiff that I had taught VICTORIA to leave the glasses alone, whereupon Plaintiff became very angry and, in VICTORIA's presence, and to my surprise and her's, he proceeded to smash the entire set of glasses by throwing them in a trash receptacle.

In early January, we had an argument. He chased me around the apartment. I became fearful for my safety and that of VICTORIA, and took her into the bathroom, closing the bedroom door behind me. Although the door was unlocked, Plaintiff broke it down, shattering it into many pieces; the door has not yet been replaced. He came into the bathroom. I managed to put VICTORIA down before Plaintiff slapped me in the head with his hands approximately five times. VICTORIA observed this conduct on the part of Plaintiff.

Plaintiff's behavior has been uniformly peculiar. He appears to fall into depressed emotional or psychological states. He would often go into one of the bedrooms in my three bedroom apartment and stay there alone, sometimes for days at a time without coming out. He has told VICTORIA that there are monsters in her bedroom, as a result of which she has found it difficult to go to sleep at night and suffers nightmares when she does. On one occasion, while giving VICTORIA a bath, he became upset when she did not mind him; he responded by turning off the light in the bathroom and walking out of the room, leaving her in tears.

When Plaintiff returned to California from the Virgin Islands in April 1984, I told him that I did not think it was healthy for him, for me, and most of all for VICTORIA for him to share my apartment. He suggested that we seek counseling. I agreed to do so, hopeful that a neutral and professional third party might convince Plaintiff to leave peacefully. On Monday, April 16, we had a session with Dr. GRAYDON G. GOSS. During this session, Plaintiff became angry and abusive toward R. Goss and me, and he stormed out of the room.

The rest of the week, Plaintiff was moody and unsociable, and we had little contact with one another. Such contact as we had quickly evolved into arguments, with violent overtones. On the evening of April 19, he chased me into the bathrool and, complaining that I was not listening to him, he put his hands around my neck. When he way himself in the mirror as he assaulted me, he let go, stating that he was only trying to gain my attention.

The following afternoon, April 20, a friend had come to visit me. In her presence, Plaintiff became angry with me and chased me down the hall way. He was in a rage and he ordered my friend out of the house; I left with her and called the police. When they arrived, they told me that they could do nothing unless and until I obtained a restraining order.

The effect of Plaintiff's conduct upon VICTORIA has been profound. On Easter Sunday, we had people visiting. VICTORIA left the room, went to her bedroom, and closed the door. When I entered, I entered, I found her on the floor, crying. The following day, I told Plaintiff that I insisted that he move out of the apartment. He refused.

On Wednesday, April 25, upon entering one of the bedrooms in the apartment, I discovered Plaintiff sitting on the bed with his legs outstretched. On one of his legs

he had placed several rocks in a line from his knee to his groin. VICTORIA was seated along side Plaintiff and, at his direction, she was picking up the rocks one by one. Subsequently, I discovered photographs of VICTORIA in the nude taken by Plaintiff. After the rock incident, VICTORIA and I moved out of the apartment. I am informed and believe that Plaintiff has attempted to see VICTORIA on at least two occasions since then at her school.

To my knowledge, Plaintiff's only source of income consists of his business interests in the Virgin Islands. There is nothing tying him to the Southern California area. Unless he is enjoined from having any contact with VICTORIA, among my concerns is the possibility that he may take her with him and leave Southern California.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of May, 1984.

/s/ Carole Singleton Dearing  
CAROLE SINGLETON DEARING

# **DECLARATION OF MICHAEL HIRSCHENSOHN**

I, MICHAEL HIRSCHENSOHN, declare:

1. I am the natural father of Victoria Dearing.

2. I have been attempting to fulfill my role as Victoria's father since she was born. My early attempts were frustrated by her mother, Carol Singleton. In November of 1982, I filed a paternity action to resolve the on-going dispute concerning custody and visitation.

3. In July of 1983 I moved to Los Angeles from St. Thomas in order to be closer to Victoria. Soon thereafter Carole asked me to move in with her and to try and begin a real family. I agreed, and in August of 1983 the three of us started living together.

4. In the Summer of 1983 I spoke with Carole about resolving this case by stipulating to my paternity and allowing me reasonable visitation and that I would pay child support at the rate of \$500 per month. I gave her a stipulation and to the best of my knowledge she signed it soon thereafter. A true copy of this stipulation is attached hereto as Exhibit "A". Since July of 1983 I have paid Carole and Victoria on the average of \$2000.00 per month in support. Now Carole tells me that she wants to withdraw the stipulation.

5. From August 1, 1983 thru April, 1984, I have been the chief source of financial support for Carole and Victoria. I have enjoyed assuming my role as Victoria's father. Victoria looks to me as her father. I walked Victoria in the mornings, made breakfast for her, dressed her for school, made her school lunches, drove her to and from school, played with her, read to her, visited friends with her, bought her gifts and took her on trips to Disneyland, Lion Country Safari etc. I believe that I have been a good father to her. Victoria calls me daddy and I love Victoria as my daughter.

6. Carole and I have been out with friends and neighbors numerous times in the last several months and have enrolled Victoria in school and taken her to a pediatrician. In all of these settings I have been acknowledged as Victoria's father.

7. In mid April of 1984, Carole and I got into an argument (not concerning Victoria) and Carole took Victoria to her mother's home. I have not seen Victoria since April 24, 1984, despite repeated requests to do so. I have not been able to tell Victoria why I have not seen her and I have not been allowed to pick her up from school.

8. May 11 is Victoria's birthday. I will be leaving for St. Thomas on the evening of May 11 and will return on June 4, 1984.

I declare under penalty of perjury that the foregoing is true and correct and if called upon as a witness could competently testify thereto.

Executed this 9th day of May, 1984 at Sherman Oaks, California.

/s/ Michael J. Herschensohn

Law Offices  
 MACKEY AND MANSFIELD  
 Suite 300  
 Credit Union Plaza  
 717 West Temple Street  
 Los Angeles, California 90012  
 Telephone 213-485-0500

April 2, 1984

Mr. Joel Aaronson  
 Attorney at Law  
 14001 Ventura Boulevard  
 Sherman Oaks, CA 91423

Re: Hirschensohn vs. Singleton  
 LASC No.: CF 022753

Dear Joel:

I am enclosing the Stipulation for Judgment which Carole has signed. The document has been re-typed. The only change is the addition of paragraphs c and the necessary re-lettering of subsequent paragraphs. I believe paragraph c to be declarative of paragraph b, and I do not expect you will have any objection to its conclusion. If I am wrong, please do not hesitate to call me. If the document meets with your approval, please have Mr. Hirschensohn execute it and forward it to Ms. Sheer for her review, approval, and execution. When all necessary signatures have been obtained, I volunteer to obtain judgment pursuant to the Stipulation.

Thank you for giving these matters your attention.

Very truly yours,  
MACKEY AND MANSFIELD

By: /s/ Larry M. Hoffman  
LARRY M. HOFFMAN

dm

Enclosure

NEWMAN • AARONSON • KREKORIAN  
• VANAMAN

Attorneys at Law

14001 Ventura Boulevard  
Sherman Oaks, California 91423-3558  
(818) 990-7722  
(213) 872-1135

May 7, 1984

Mr. Larry Hoffman  
Mackey & Mansfield  
717 N Temple St.  
Suite 300  
Los Angeles, CA. 90012

Re: Victoria Dearing

Dear Larry:

It is obviously clear from all that has gone on since last year at this time that your client has acknowledged and accepted the fact of our client's fatherhood of Victoria. It's also clear from recent events that the parties have great conflicts and therefore great difficulty in living with one another. This should not however create a situation in which Victoria, who has had a nurturing loving father for the past months, be deprived of his proximity because of the conflicts between Carole and Michael.

Michael has left Carole's residence and plans to stay away from her. He would like to arrange to visit with Victoria for her birthday which is Friday, May 11. I hope you can persuade your client to cooperate since the alternatives are so obviously detrimental to Victoria's well being.

Hope to hear from you very shortly.

Very truly yours,

/s/ Joel S. Aaronson  
JOEL S. AARONSON

JSA/rjw

cc: client

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

---

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff,*

vs.

CAROLE SINGLETON aka CAROLE SINGLETON DEARING, and  
VICTORIA CAROLE DEARING, a Minor, and GERALD  
DEARING, an individual,  
*Defendants.*

---

[Filed Aug. 15, 1984]

---

ANSWER OF GERALD DEARING TO  
FIRST AMENDED COMPLAINT

Defendant, GERALD DEARING, answers plaintiff,  
MICHAEL HIRSCHENSOHN'S, First Amended Com-  
plaint to Establish Paternity and the Establish Father/  
Child Relationship as follows:

1. Answering defendant denies each and every allega-  
tion of Paragraphs 1, 2, 4, 7, 8, 12, 13, 15, 16, and 17.

2. Answering Paragraph 3 of Plaintiff's Complaint,  
defendant admits that the child was born on May 11,  
1981, in Los Angeles, California, but denies each and  
every allegation contained therein.

3. Answering Paragraph 5 of plaintiff's Complaint,  
defendant admits that defendant SINGLETON prema-  
turely gave birth to VICTORIA CAROLE DEARING on

May 11, 1981, but denies each and every other allegation therein.

4. Defendant lacks sufficient information or belief to answer the allegations of Paragraphs 6 and 9 of plaintiff's Complaint and, basing his denial on that ground, denies each and every allegation therein.

5. Answering Paragraph 11 of plaintiff's Complaint, defendant admits that he is married to CAROLE SINGLETON DEARING and he does reside in New York, New York.

#### FIRST AFFIRMATIVE DEFENSE

6. Plaintiff is barred from bringing this paternity action under Civil Code Section 7006(a)(1) in that he is neither the child, the child's natural mother, or the presumed father.

#### SECOND AFFIRMATIVE DEFENSE

7. This action is barred by the conclusive presumption of Evidence Code Section 622.

WHEREFORE, Defendant prays judgment as follows:

1. That plaintiff's Complaint be dismissed;
2. That defendant GERALD DEARING is conclusively presumed to be the father of VICTORIA CAROLE DEARING;
3. For such other and further relief as this Court deems proper.

DATED: August 13, 1984

GLEN H. SCHWARZ  
A LAW CORPORATION

/s/ Glen H. Schwartz  
GLEN H. SCHWARTZ  
Attorney for Gerald Dearing

### THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

---

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff,*

vs.

CAROLE SINGLETON aka CAROLE SINGLETON DEARING and  
VICTORIA CAROLE DEARING, a minor, and GERALD  
DEARING, an individual.  
*Defendants.*

---

VICTORIA CAROLE DEARING a minor,  
*Cross-Complainant,*

vs.

MICHAEL HIRSCHENSOHN, CAROLE SINGLETON aka CAROLE  
SINGLETON DEARING, GERALD DEARING.  
*Cross-Defendants.*

---

[Filed Aug. 15, 1984]

---

#### ANSWER OF GERALD DEARING TO CROSS-COMPLAINT FOR DECLARATORY RELIEF, TO ESTABLISH PATERNITY AND TO ESTABLISH FATHER-CHILD RELATIONSHIP

Cross-Defendant, GERALD DEARING, answers the  
Cross-Complaint of VICTORIA CAROLE DEARING, a  
Minor, as follows:

1. Cross-Defendant admits each and every allegation contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the Cross-Complaint.

2. Answering the allegations of Paragraph 7 of the Cross-Complaint, Cross-Defendant denies that VICTORIA CAROLE DEARING, a Minor, is entitled to fees and costs from this answering Cross-Defendant.

3. Answering the allegations of Paragraph 8 of the Cross-Complaint, this answering Cross-Defendant denies that there is any controversy as to the identity of VICTORIA CAROLE DEARING'S father.

4. Answering the allegations of Paragraph 9 of the Cross-Complaint, this Answering Cross-Defendant admits that there is a psychological father-child relationship between he and VICTORIA CAROLE DEARING, but denies each and every other allegation contained in Said Paragraph 9.

#### FIRST AFFIRMATIVE DEFENSE

5. Cross-Complainant fails to state facts sufficient to constitute a cause of action against this answering Cross-Defendant, in that the facts, as alleged in the Cross-Complaint, conclusively presume this answering Cross-Defendant to be the father of VICTORIA CAROLE DEARING under Evidence Code Section 621.

#### SECOND AFFIRMATIVE DEFENSE

6. Cross-Complainant's cause of action is barred by the conclusive presumption of Evidence Code Section 621.

WHEREFORE, Cross-Defendant prays judgment as follows:

1. That Cross-Complainant's Complaint be dismissed;
2. That Cross-Defendant GERALD DEARING is conclusively presumed to be the father of VICTORIA CAROLE DEARING;

3. For such other and further relief as this Court deems proper.

DATED: August 13, 1984

GLEN H. SCHWARTZ  
A LAW CORPORATION

/s/ Glen H. Schwartz  
GLEN H. SCHWATZ  
Attorney for Gerald Dearing

The Court finds that the child will benefit from a short delay of the visits scheduled for the weekend of October 5 through October 8, because of the risk that she will become involved in the confrontation and/or conflict between the parties associated with the pending orders to show cause.

THEREFORE, the Court orders that the visits that would ordinarily take place on October 5 and October 8 be postponed only until the weekend of October 12 through October 15, on dates and at times to be agreed upon among the parties, and shall continue at two week intervals thereafter, until further order of Court.

Oct. 4, 1984

/s/ John H. Sandoz  
JOHN A. SANDOZ  
Judge Pro Tempore

I, Norman Stone, declare:

I am a licensed clinical psychologist, appointed by the Court to assess the parties and make recommendations regarding the best interests of Victoria Dearing. I believe that a visit between Victoria and Michael Hirschensohn, while the pending Order to Show Cause is trailing or being tried, would be unduly distressing to Victoria. Such a visit would be more valuable to Victoria, once the visitation issue has been resolved, and the adult parties have had an opportunity to cool down after the heat of the litigation. The visit should take place within the next two weeks, ideally several days after the hearing has been concluded. Scheduling of the visit at that time will permit Victoria to receive explanations of the new visitation schedule both from Michael, and from Carole and Gerald. In the event that the Order to Show Cause has not been heard at the end of the two weeks, the visit should not be delayed any further.

I have met with the adult parties to discuss the findings of my report with them. These recommendations are based both on the findings of our original evaluation and my observations of the parties' reactions to the report. The pendency of litigation is exacerbating the tensions between the parties. Their agitation is inevitably transmitted to Victoria, who will therefore experience some distress. I am concerned that a visit will increase the agitation of all of the adults, and place Victoria in the center of the conflict. I do not believe that Carole can prepare Victoria for the visit calmly. Although Michael will not intensionally do anything to communicate the conflict to Victoria, he, too, is sufficiently distressed that his distress will be communicated to Victoria.

Ironically, the bringing of an ex parte motion to cancel the visitation has, itself, exacerbated the tensions. Thus Carole has contributed to the very situation that the

proceeding professes prevent. For that reason, as well as my concern that Victoria will start worrying if she does not see Michael within a few weeks, I recommend no more than a two week delay of the visit.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 4, 1984 at Los Angeles, California.

/s/ Norman Stone, Phd.D.

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF  
LOS ANGELES

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
vs. *Plaintiff,*

CAROLE SINGLETON aka CAROLE SINGLETON DEARING and  
VICTORIA CAROLE DEARING, a minor, and GERALD  
DEARING, an individual,  
*Defendants.*

And related cross-action

AFFIDAVIT OF GERALD DEARING

STATE OF NEW YORK     )  
                                  ) ss.  
COUNTY OF NEW YORK    )

GERALD DEARING, being first duly sworn, poses and says:

1. I am the father of VICTORIA DEARING and the husband of CAROLE SINGLETON DEARING. Carole and I were married on May 9, 1976, at Las Vegas, Nevada, and we are still residing together as husband and wife in New York City with our daughter, Victoria.

2. Carole and I had continual sexual relations, including sexual intercourse regularly since several months before our marriage until October 1981, when we separated. I am not now, nor have I ever been, impotent or sterile. In addition to the pregnancy which gave birth to Victoria, on two previous occasions I impregnated Carole:

The first pregnancy terminated by miscarriage and the second by therapeutic abortion.

3. Victoria was conceived in September 1980, and we were a happy family until October 1981, when I was required to return and maintain my residence in New York, where I was employed by a New York based French oil company. Carole decided, against my wishes, not to accompany me and I reluctantly agreed that she and Victoria could stay in Los Angeles. This was the first occasion since our marriage that Carole and I were separated for reasons other than short business trips.

4. During this separation, in October 1981, Carole and Victoria came to New York, and spent a month with me, and in Spring 1982, spent another month with me, and spent another month with me in the summer of 1982 (During which time Victoria was baptized in a ceremony attended by my family from France). In the fall of 1982, Carole and Victoria and I spent three weeks in Europe, and upon returning Carole and I agreed to reconcile.

5. On May 11, 1982, I received a phone call from a man who identified himself as plaintiff and told me that he and Carole had had a secret extramarital affair and he was the father of Victoria. This was the first time I ever heard any such allegations or had any reason to believe Carole was not faithful to me.

6. Carole, Victoria and I lived together in a family unit in New York City, until July 1983, when Carole and I again separated, and Carole and Victoria once again moved to Los Angeles. For the next ten months, during the separation, I stayed in constant contact with both Carole and Victoria, both by telephone and by visiting on holidays. Like every other father who is separated from his child, I rationalized the separation, stayed as close to my daughter as possible, and prayed that one day we would all be back together.

7. In June 1984, Carole and I did reconcile, and since then Carole, Victoria and I have lived very happily in New York. I believe that our relationship is stronger and more loving than it has ever been, the only irritant being the constant intrusion by plaintiff. I am confident that once plaintiff's lawsuit ends his interference into our lives will also end, and Carole, Victoria and I can continue to be a happy family.

Executed this 17th day of October, 1984, at New York, New York.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Gerald Dearing  
GERALD DEARING

STATE OF NEW YORK     )  
  ) ss.  
COUNTY OF NEW YORK    )

On this the 17th day of October, 1984, before me GERALD DEARING, the undersigned Notary Public, personally appeared GERALD DEARING, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

WITNESS my hand and official seal.

SEAL

/s/ [Illegible]  
Notary's Signature

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF  
LOS ANGELES

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff,*  
vs.

CAROLE SINGLETON aka CAROLE SINGLETON DEARING and  
VICTORIA CAROLE DEARING, a minor, and GERALD  
DEARING, an individual,  
*Defendants.*

And related cross-action

AFFIDAVIT OF CAROLE SINGLETON DEARING

STATE OF NEW YORK     )  
                                  ) ss.  
COUNTY OF NEW YORK    )

CAROLE SINGLETON DEARING, being first duly  
sworn, poses and says:

1. I am the mother of VICTORIA DEARING, and I  
am married to Victoria's father GERALD DEARING.  
Gerald and I were married on May 9, 1976, at Las Vegas,  
Nevada, and are still living together as husband and  
wife with our daughter Victoria in New York City.

2. Except for a period of separation necessitated by  
our respective careers, Gerald and I resided together con-  
tinuously from the date of our marriage, May 9, 1976,

until October 1981. Gerald and I have engaged in sexual  
intercourse throughout our marriage. I have never  
known Gerald to be impotent, nor do I have any knowl-  
edge that he is sterile. In fact, approximately two years  
before Victoria was born, I conceived a child as a result  
of intercourse with Gerald: That pregnancy was termi-  
nated by therapeutic abortion. Approximately three  
years before Victoria was born, I conceived another child  
as a result of intercourse with Gerald: That pregnancy  
terminated by a miscarriage. During the several occa-  
sions of sexual intercourse during September 1980, Vic-  
toria was conceived.

3. Victoria was born one month premature, and  
Gerald was with me in the delivery room at the time of  
birth. Thereafter, Gerald and Victoria and myself lived  
happily together as a family unit until October 1981.

4. In October 1981, Gerald was required to move to  
New York for business reasons. I elected not to accom-  
pany him, and Gerald reluctantly agreed that Victoria  
and I could remain in Los Angeles. In spring 1982, Vic-  
toria and I went to New York and stayed with Gerald  
for one month, and in the summer of 1982, Victoria and  
I again stayed a month in New York with Gerald. (Dur-  
ing the latter period, Victoria was baptized in a ceremony  
attended by Gerald's family who had come from France  
for the occasion. In fall 1982, Victoria, Gerald and my-  
self spent three weeks together in Europe, and upon re-  
turning Gerald and I agreed to reconcile. Thereafter,  
the three of us lived together in New York.

5. In July 1983, Gerald and I again separated and  
Victoria and I returned to Los Angeles, where we re-  
sided in an apartment in Playa del Rey. It was during  
this separation period that plaintiff became familiar with  
Victoria. Plaintiff stayed with us sporadically at the  
Playa del Rey apartment. During the period from Aug-  
ust 1983, through April 1984, plaintiff stayed with us

for no more than a total of ninety days, and only in August and October 1983, did he stay for as many as thirty consecutive days. In April 1984, I terminated my relationship with plaintiff and Victoria and I moved out of that Playa del Rey apartment to avoid any further contact with plaintiff.

6. In June 1984, Gerald and I reconciled and I returned to New York, where Gerald, Victoria and I have resided and still are happily residing with the hope and expectation of remaining together as a family for the rest of our lives.

Executed this 17th day of October, 1984, at New York, New York.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Carole Singleton Dearing  
CAROLE SINGLETON DEARING

STATE OF NEW YORK     )  
                                  ) ss.  
COUNTY OF NEW YORK    )

On this the 17th day of October, 1984, before me CAROLE DEARING, the undersigned Notary Public, personally appeared CAROLE SINGLETON DEARING, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that she executed it.

WITNESS my hand and official seal.

SEAL                     /s/ Naim K. Datora  
Notary's signature

## FAMILY EVALUATION

### IDENTIFYING INFORMATION

Family Name: Hirschensohn-Singleton-Dearing

Dates of Evaluation: 6/08/84, 6/09/84, 9/07/84,  
9/08/84, 9/09/84, 9/11/84

Place of Evaluation: 15250 Ventura Blvd., Sherman  
Oaks, CA

Examiners: Norman M. Stone, Ph.D.  
Susan F. Stone, M.S.

Date of Report: 9/24/84

### PARTICIPANTS

Michael Hirschensohn, 12/26/42

Carole Singleton Dearing, 2/03/51

Gerald Dearing, 12/27/40

Victoria Dearing, 5/11/81

### BASIS OF EVALUATION

Michael Hirschensohn

Minnesota Multiphasic Personality Inventory (Taken  
twice)

Shipley Institute of Living Scale

Thematic Apperception Test

Hand Test

Roth Mother-Child Inventory

Projective Drawings

Clinical Interviews (4½ hrs.)

## Carole Singleton Dearing

Minnesota Multiphasic Personality Inventory  
 Shipley Institute of Living Scale  
 Thematic Apperception Test  
 Hand Test  
 Roth Mother-Child Inventory  
 Projective Drawings  
 Clinical Interviews (4½ hrs.)

## Gerald Dearing

Minnesota Multiphasic Personality Inventory  
 Shipley Institute of Living Scale  
 Thematic Apperception Test  
 Hand Test  
 Projective Drawings  
 Clinical Interviews (3½ hrs.)

## Victoria Dearing

San Fernando Valley Preschool Screening Inventory  
 Rorschach  
 Children's Apperception Test  
 Family Relations Test (Administered twice)  
 Connor's Behavior Checklist  
 Chess Temperament Scale  
 Play Interview  
 Sexual Abuse Screening Interview

## Family Observation

Michael and Victoria (3½ hrs.)  
 Carole and Victoria (3 hrs.)  
 Carole, Gerald, and Victoria (1½ hrs.)

## Joint Interviews

Carole and Gerald (1 hr.)  
 Michael, Carole, and Gerald (1½ hrs.)

## Contacts with Ancillary Parties

Robin Drapkin, Ph.D., family therapist

Review of previous court records

## FAMILY HISTORY

Carole and Gerald met while they were both residing in Paris in 1975. Shortly thereafter, Carole returned to Los Angeles where her ten year old son from her previous marriage was living with her parents. Gerald visited Carole in Los Angeles and the couple married in 1976.

Carole and Michael met in Los Angeles in June 1978. Approximately three months later they began an affair.

From approximately October 1979 to June 1980 and from September 1980 to December 1980 Carole was modeling in Europe. In September 1980 Gerald went to New York visiting his relatives. In October 1980 Carole realized she was pregnant and had an abortion. In December 1980 Carole returned from Europe and spent the holidays with Gerald in New York.

In January 1981 Carole discovered she was five months pregnant. She met with Michael who reportedly proposed. Gerald returned to Los Angeles in April 1981. Victoria was born May 11, 1981.

In October 1981 Gerald moved to New York to set up a business. During this month Michael, Carole and Victoria had a blood test to determine paternity at UCLA. In Spring 1982 Carole, Victoria and Carole's mother visited Michael in the Virgin Islands.

On Victoria's first birthday (5/11/82) Michael called Gerald and told him that he (Michael) was the biological father. In November 1982 Carole was served with a paternity suit. In March 1984, after maintaining joint residency with Michael for eight months, Carole signed a stipulation naming Michael as Victoria's biological father. She left their shared residence the following month.

The following chart was constructed based upon information provided by Carole, Gerald, and Michael. It approximates Victoria's living experience thus far:

Date	Age	Residence	Principal Caretakers
May 81-Oct. 81	0-5 mos.	Los Angeles	Carole, Gerald
Oct. 81-Jan. 82	5-8 mos.	Los Angeles	Carole
Jan. 82-March 82	8-10 mos.	Virgin Islands	Carole, Michael, Carole's Mom
March 82-April 82	10-11 mos.	New York	Carole, Gerald
April 82-May 82	11-12 mos.	Los Angeles	Carole
May 82-March 83	12-22 mos.	Los Angeles	Carole, Scott
(June 82)	13 mos.	New York	Carole, Gerald)
(Fall 82)		New York, Europe	Carole, Gerald)
March 83-June 83	22-25 mos.	New York	Carole, Gerald
June 83-Aug. 83	25-27 mos.	Los Angeles	Carole
Aug. 83-April 84	27-35 mos.	Los Angeles	Carole, Michael,
(Nov. 83)	30 mos.	New York	Carole, Gerald)
Apr. 84-June 84	35-37 mos.	Los Angeles	Carole
June 84-Aug. 84	37-39 mos.	New York	Carole, Gerald
Aug. 84-Sept. 84	39-40 mos.	Los Angeles	Carole, Gerald, Carole's Mom

### SUMMARY OF IMPRESSIONS

1. In general Carole is an exceptionally charming but child-like individual. She possesses a quality of effervescent warmth and spontaneity; the darker side of which reflects egocentricity, stimulation-seeking, impulsivity, a non-analytic approach to problems, and an underlying sense of powerlessness. Her past behavior and current personality predisposition reflect an emphasis on pursuit of immediate gratification of personal needs and strong avoidance of any negative feelings (anxiety or resentment). Consequently she has up to now exhibited a limited capacity to enact the degree of intimacy or self-sacrifice that normally characterizes relationships between spouses and/or parents and children. Thus, history data, testing, interviews and family observations all combine to raise serious questions regarding Carole's capacity to substantially care for Victoria on a consistent basis over time.

2. Gerald is a gentle, tolerant and in many respects wise man, who combines intellect with compassion. These characteristics stem in large part from his highly passive, distant, aesthetic, philosophical manner of relating which protects him from conflict and permits him to maintain a romanticized view of the world. Consequently he exhibits a passive unconditional attachment to Carole and Victoria. He loves them when they are with him. It is highly unlikely he will pursue them when they go. Consequently, in all probability, Carole will be Victoria's primary caretaker throughout her childhood with Gerald playing a potentially important but peripheral/supportive role.
3. The probability that Carole and Gerald will maintain a joint household is low. They have resided together a total of seven months in the last three years and never for longer than a three month duration. In general, Gerald's relationship with Carole appears more paternalistic than spousal, with Carole returning to Gerald in times of crisis, or in between lovers, like a young adult going back home. Observations of their present interaction by the examiners and the family's therapist, Dr. Drapkin, as well as statements made individually by Gerald and Carole in the therapy and evaluation settings clearly suggest the tentativeness of their present relationship.
4. Michael is a strong-willed and intense individual who has suffered numerous losses in his life. He has translated the resulting strong unmet needs for affection into alternately sympathy-eliciting and aggressive (intrusive, controlling, argumentative) behaviors. This approach has failed to bring him the close relationships he seeks, leaving him instead to feel victimized. In turn, these feelings of victimization only exacerbate his sympathy-eliciting and aggressive pur-

suit of relationships, establishing a potentially endless cycle.

Michael's longing for closeness has led to a strong (given the degree of contact) positive attachment between he and Victoria. His strong desire and capacity to share a nurturant relationship makes him an attractive figure to Victoria who readily reciprocates his affection. Unfortunately, the magnitude (generated by personal unfulfilled needs versus appreciation of Victoria) and nature (peer-like and possessive) of his affection for Victoria while clearly satisfying to her, could have serious long-term negative consequences. However, psychological testing and specialized interview techniques with Victoria revealed no evidence of any inappropriate sexual contact between Michael and Victoria. On the other hand, on the basis of psychological testing, interviews and family observations with Michael, he exhibits virtually all of the characteristics associated with parents who engage in incestuous-type relationships.

5. An extraordinarily high degree of conflict exists between the three parties. The magnitude of conflict stems from 1) the betrayal of trust extant in their relationships with one another around the issues of fidelity, paternity and broken legal agreements, 2) marked personality dissimilarities between Michael and Gerald, 3) Gerald's felt need to assume the role of Carole's protector, 4) the antithetical coping styles of Carole and Michael. Ironically, both have much in common with respect to their impulsivity, tendency toward egocentricity, and underlying feelings of inadequacy. However, each deals with personal distress in opposite ways—Michael through rumination and sensitization, and Carole through repression and flight. This contrast in coping styles predisposes them to interpret the other's (defensive) actions as antagonistic toward them; 5) It is the suspicion of the

examiners and Victoria's therapist that Michael (at a conscious level) and Carole (at an unconscious level) retain a positive attraction for one another, although both deny such feelings. Their mutual anger, or course, gives strength to their denial.

6. Three general family structures are potentially available to Victoria: 1) Carole as primary caretaker, 2) Michael as primary caretaker, and 3) Carole and Michael sharing caretaking responsibilities. On the basis of inferences drawn from our cumulative observations and impressions, *each* of the alternatives would approximate a "World of Abnormal Rearing" (Helfer's term for parenting of abused children) that would predispose Victoria to future emotional and social problems.

In the first instance she would likely be exposed to a pattern of fluctuating nurturance/relative neglect by her mother in a sequence of households of changing composition. In the second instance she would experience an indulgent enmeshed relationship with Michael that would be likely to contain elements of role reversal in which she would experience responsibility for satisfying his emotional needs. This type of relationship would carry a higher than base-rate *risk* of inappropriate sexual contact, although the probability of such behavior would be low (and cannot be confidently predicted several years into the future). In the third instance Victoria would be exposed to not only Michael and Carole's high level of conflict in Victoria's attempt to identify with both parents but she also would be exposed to divergent interactional and behavioral styles and expectations. Moreover, it is likely that each parent's antagonism with the other would significantly impair their ability to focus their energy on Victoria's needs. Thus, in-

stead of complementing one another's deficiencies, it is more likely they would end up detracting from one another's strengths.

7. Victoria is a developmentally competent 3½ year old of above average intelligence. She is a strong-willed and fairly independent youngster who takes pride in her accomplishments. While she demonstrates some stress in reaction to her current circumstances, she generally exhibits low anxiety. She is positively attached to all three parent figures, *principally and equally*, Michael and Carole. She seems to have low difficulty separating from each by practicing "isolation" i.e., seemingly cutting off her feelings for one when moving to the other. Both Victoria's therapist and the current examiners did note however that Victoria appeared angry at times at her mother. It was suspected that her relationship with Michael has contributed to these feelings.
8. Actualization of any of the three potential parenting structures available to Victoria has a greater probability of resulting in a long-term negative outcome for her development than in a positive outcome. Among the three choices the present option for a shared/conflicted parenting plan appears to have the greater likelihood of being detrimental to her development.

In light of Victoria's temperament, intellect, and present personality structure it appears that the assignment of her Mother as principal caretaker (leading to a possible parenting pattern of fluctuating neglect) might be less detrimental to Victoria's long term development as opposed to assigning principal responsibility to Michael (leading to a possible parenting pattern of indulgence and role-reversal).

## SUMMARY OF CONSIDERATIONS PERTAINING TO RECOMMENDATION

1. In the absence of any history of parental behavior that would be considered "endangering" or formal "neglect" by the standards of Child Protective Services; and moreover in the absence of any demonstrable behavioral or developmental deficiency or problem in Victoria, we are not inclined to consider removing her from the care of her current principal caretaking figure.
2. In light of our reservations regarding Michael's current personality functioning and how this predisposition appears to manifest itself in defining the magnitude and nature of his relationship to Victoria, we cannot recommend he be assigned major caretaking responsibilities at this time.
3. In light of the high degree of conflict between all parties, we believe that the potential benefits of having the parties share in the parenting of Victoria even to the extent of fostering "reasonable" or "standard" visitation schedule are strongly outweighed by the potential harm to Victoria (as outlined in detail in the Table at the conclusion of the following section).
4. The relative advantages to Victoria of remaining in her Mother's care while maintaining highly restricted contact with Michael at this time is increased in light of the principal social-emotional tasks associated with Victoria's current developmental stage. At this point in her development Victoria is forming a social (versus family) and sexual identity. Intensifying the relationship between Victoria and her Mother (by limiting her contacts with Michael) will facilitate her acquisition of an appropriate gender identity. Alternatively, given her Mother's less consistent and relatively lower warmth contrasted with Michael's indul-

gent warmth and ambivalent attitudes toward women, she would be more likely to grow up more conflicted about her worth as a female. Just as importantly, under her Mother's care rather than Michael's she is more likely to develop a more accurate sense of limits related to her personal competency in general and responsibility for others. Consequently she should be better able to face the challenges of the next stage of life (focusing on school achievement) without the burden of excessive self-restraint or omnipotence.

5. Michael's current degree of social isolation poses another relative disadvantage in considering assignment of major parental responsibility to him at this time. Carole's relationship network (whether with Gerald and his family or others) offers Victoria the opportunity to interact with, learn from, and be nurtured by others who might compensate for some of Carole's inadequacies. Such opportunities or "buffers" would be unavailable in her relationship to Michael. More importantly, the absence of intragenerational friends increases the likelihood that Michael will establish a highly enmeshed relationship with Victoria characterized by role reversal, i.e., in which she will be expected to satisfy his needs (to be loved) as much as receive satisfaction of her needs from him.
6. While we believe for all of the aforementioned reasons that Michael's caretaking responsibilities and interaction with Victoria be strictly limited, especially at the present time, we believe it is important for Victoria that he be permitted to remain a member of her family. We do not make this recommendation because we believe his status as either a psychological or biological parent entitles him to such a position. Nor do we make this recommendation because we believe any child, or even Victoria, necessarily and automatically benefit from "The Truth" regarding his or her heritage. Rather, we make this recommenda-

tion because we perceived Michael as the single adult in Victoria's life most committed to caring for her needs on a long-term basis. On the basis of historical data and inferences based on psychological examination, we suspect that neither Carole nor Gerald will prioritize their parental role in life over their personal/social roles, to the degree that could be expected of Michael. Consequently, while we believe that encouraging a close relationship between Michael and Victoria over the next two to three years could have serious risks to Victoria's long-term development, we believe excluding Michael from her life would pose even greater risks.

7. Victoria's living circumstances up to now have been highly unstable. Her older brother's pattern of rearing, while much less chaotic, was also characterized by exposure to multiple and shifting caretakers. The degree of impulsivity, stimulation-seeking and dependency that Carole presently exhibits further contributes to our belief that it is impossible to predict the quantity and/or quality of father-figures and/or substitute caretaking figures Victoria may be exposed to in the course of her childhood. On the basis of our interviews and the results of psychological testing we believe Michael rather than Gerald can be expected to take a more active interest in guaranteeing protection, should such action be required.
8. In the event that it becomes important for Michael to assume primary caretaking responsibility for Victoria in the future, it is imperative he receive psychological treatment to address those personality characteristics cited earlier in this report as potentially detrimental to his parenting of Victoria. The probability of Michael benefitting from psychological therapy addressing these underlying personality issues is guarded. His openness to change is limited by a number of factors: his reliance on pity and blame to remove

responsibility from himself, his long-standing lack of trust in others reflected in low self-disclosure and the rigidity of his defenses (rationalization and intellectualization) that permits him to retain a self-satisfying anger with others. Thus while it was readily apparent that Michael can alter specific behaviors in response to feedback (e.g., in response to the examiner's previous testimony), it is less likely that he will be able to modify these underlying personality issues without intensive effort. On the other hand, given Carole's avoidance of tension, readiness to act-out/externalize internal conflicts through rewarding interpersonal behavior (i.e., "fun") and failure to act on information provided in the examiner's previous testimony, there is an even lower probability of her benefiting from psychological treatment to modify her parenting practices.

9. We believe it is beneficial to Victoria that she be permitted to maintain a relationship with Michael over the next two to three years. She and Michael share a strong positive, mutual attachment. It would be unnecessarily hurtful to deprive her of his affection and intellectual stimulation. At the same time we believe it could be detrimental to Victoria for she and Michael to share a more normalized parent-child relationship for all the reasons cited previously.

We believe it would be *optimal* for Victoria to experience a more expanded and normalized relationship with Michael. However, we are apprehensive regarding the consequences of fostering such a relationship at this time. Put more directly, at this time we are inclined to recommend what we see as *safest* as opposed to what we see as most *optimal*.

We make these recommendations with full appreciation of the depth of Victoria's attachments to Michael and the magnitude and longstanding nature of Michael's commitment to care for Victoria.

If our evaluation were focused upon a contest of devotion or a contest of parenting skills, the current recommendations would be very different.

Finally, with empathy for Michael's potential reaction to this report, we hope he will understand our belief that for adults love is never a right, just a gift; not an expectation but a simple blessing of fortune. Thus, in its loss there is no compensation; only sadness and more love.

## PRINCIPAL FINDINGS

### Carole

"Carefree, joyful, fun and out for a good time" was how Carole described herself at the initial interview. Her account of her life suggests that until recently she had been successful in realizing this description. External pressures and responsibilities had been and continue to be ignored, e.g., failure to pay taxes, refusal to use contraceptives, ignoring court order, and currently maintaining a highly limited awareness of the court conflict (e.g., unsure of what would transpire on the next court date and what action to anticipate subsequently). Internal tensions were just as easily discharged through multiple sexual relations (referred to as "blasting off"), and other forms of acting out, including, we suspect, excessive alcohol use (e.g., "when things get rough, I get carefree").

Carole's pursuit of immediate gratification and intolerance of internal or external conflicts and negative affects appears to have its origins in early childhood during which she felt she could "never do anything right" and in which she suffered the loss of her older brother when she was six and experienced her mother's subsequent emotional withdrawal. Thus underneath a gay exterior, Carol exhibits underlying feelings of inadequacy, dependency, and repressed anger. Consequently she pursues

closeness with others only to flee when she achieves it, unable to tolerate the tension that is endemic to all relationships. This characteristic was clearly evident on projective personality testing. It was exemplified in her relationship to her son Joey whom she left with her mother at age three, to pursue a modeling career, explaining, "It was better to go than to have the resentment (at him)". A reluctance to experience negative feelings toward Victoria was evident in Carole's completion of the Connor's Behavior Checklist. Although she clearly has the most difficulty managing her behavior among the three adult figures interviewed, she cited the fewest behavior problems with Victoria.

Failure to recognize and resolve conflict ultimately impairs one's ability to share intimate relationships. Carole's capacity for intimacy seems clearly impaired. For example, she described relationships with men in Europe as "hit and run", and after a year-long relationship with Scott terminated their relationship, complaining "He was getting on my nerves; he wanted to get married". Furthermore, her "bi-coastal marital relationship" with Gerald was initiated only when she was approaching her departure from Europe, and culminated in marriage only after he sold his belongings and relocated from Paris to Los Angeles.

When conflict or closeness become uncomfortable Carole flees. Her history of multiple relationships within the course of her marriage to Gerald are testimony to this pattern. Asked how she coped with leaving Michael to go to Europe after first initiating a love affair, she answered (with characteristic blightness), "Out of sight, out of mind". When Carole cannot put an old relationship out of sight she may rely upon distortion to achieve a tolerable emotional distance. Thus despite her firm and repeated conviction that Michael was "crazy" or "off" she could offer very little confirming substantiation

with respect to his behavior (e.g., jogging when he had a migraine, wearing contact lenses when his eyes were "bleeding"). Moreover her explanation for past events, i.e., reason Michael moved in, alleged threats against her welfare and Michael's inappropriate (immodest) behavior around their apartment appeared to contain elements of distortion. The most obvious distortion of his role in her and Victoria's life was manifest in the conjoint interview with Michael and Gerald when Carole asserted, "He (Michael) doesn't feel or act like a Dad! Suddenly it's the issue". Carole could not answer Michael's question "When did I become bad?" because she may very well not have conscious awareness of the answer. The answer in all likelihood is when their relationship became too close.

Carole's ability to distance herself from Michael is seriously compromised by the need to have Victoria with him. It seems to us (independent of our own assessment of Michael) that Carole's desire to terminate Michael's contact with Victoria is motivated more by her personal need to avoid self-resentment rather than by any objective assessment of Michael. Thus she asserted her wish that Victoria does not "pick up his attitudes" and reported "when I see him I feel angry and disgusted with myself".

Carole's difficulty with intimacy is likely to have consequences in her day-to-day parenting as well as her short-term relationships with peers. For example, Gerald is largely responsible for preparation of meals and when Victoria plays in her bath, Carole may rest in an adjacent room. During the last two weeks of Victoria's six-week stay in New York the couple hired a full-time, in-home teacher/caretaker for Victoria.

In the clinic Carole exhibited limited tolerance for Victoria's clinging (to Gerald) or limit-testing behavior. She never demonstrated any authority in their relationship nor did she initiate or share physical affection with

Victoria. Carole did not initiate play behavior with Victoria. Play that Victoria initiated between her and her Mom was largely void of imagination or interactive elements, in marked contrast to play between Victoria and Gerald or Michael. Consistent with these observations, within the clinic Victoria not only seemed to prefer the company and affection of her father figures but in general seemed to relate better to the male examiner than the female examiner, suggesting the behavior observed within the clinic may be an example of the Mother-daughter interaction in general.

All of the foregoing observations obviously have negative prognostic implications with respect to the anticipated quality of Victoria's long-term relationship with her mother. At best it suggests a relatively low prioritization of the parental role for Carole, at worst it resembles a fluctuating pattern of mild emotional neglect.

#### *Gerald*

Gerald is an intelligent and sensitive gentleman. In interviews any psychological testing he was at all times direct and open. His observations were insightful, generally objective, sometimes witty, and sometimes poignant.

Gerald maintains a somewhat passive relationship to events characteristic of an artist; someone who seeks to understand and appreciate events more so than simply experience or master them. His atypical responses to projective personality test items reflected this passivity and distancing. In response to an inkblot normally seen simply as "a butterfly", he perceived "A strange flying animal . . . that exists in your imagination". In response to a card depicting a small boy and a violin he told a story of the boy dreaming to play but refusing to. "He knows what sounds can come out of it. Art is best in fantasy".

Life too is sometimes best in fantasy. After learning from Michael and Carole on Victoria's first birthday that Victoria might not be his child, he reported withdrawing to his apartment and sitting and drawing for days. He was quite aware of Carole's history of infidelity but had a very imprecise knowledge of dates and facts. "I never wanted details", he explained, and went on to say, "This debate (current conflict) is higher than that . . . it is a tragedy for everyone".

Gerald was quite literally born into a "fantasy world". On the day he was born in France, 1940, his father was arrested by the Germans. Ten days later his Mother died. He was raised by his sister (eighteen years older than he) who he called (and still calls) Mother. She had four other sons (his nephews) who he always related to and identifies as his brothers. His biological father re-entered his life at the end of World War II when he was five. But Gerald was unwilling to treat him as a Father but, like his "brothers", related to him as his grandfather.

Obviously Gerald engaged in considerable "fantasy" to maintain his reality of family. In this regard the parallel between his own family (i.e., Carole and Victoria) and his family of origin is striking. He maintains strong loyalty and emotional and financial support for a wife who for the last several years has lived principally with other men and a daughter who may very well not be his logically his.

Gerald recognizes that he has failed to assert his needs in the past with respect to his relationships with Victoria and Carole. Presently he is acting assertively to defend Carole's interests in the current conflict. It is not at all clear he experiences self-interest to defend.

He asserts and we believe clearly experiences a real attachment to both Carole and Victoria. He asserts Carole

has "never left him mentally" and regardless of Victoria's biological heritage he experienced himself as her father for the first year of her life and thus no "facts" to the contrary can erase that feeling presently. Simultaneously, his emotional commitment to both appears passive or entirely reactive to their needs.

He was very frank in discussing his perception of Carole's inadequacies as a mate and fantasies he has entertained about other relationships. Asked if he anticipates she will stay with him, he answered, "I think so. No one can tell". Asked if he thought she would return to Michael, he paused smiling and said, "... maybe someone else". In fact, after a visit with Robin Drapkin, Carole, in leaving the office, spontaneously wondered aloud "where (she'd) be this time, next year". Given the history of her relationship to Gerald it is a most reasonable question to ask.

Gerald demonstrates a similar nonpossessive attitude toward Victoria. Unfortunately a nonpossessive relationship to a child could also be nonprotective. When asked what he would do if Carole were ever to move in with someone he thought might be detrimental to Victoria's well-being he said he had never considered that possibility, but he would take action "if he were Michael multiplied by ten and had a really bad effect on Victoria".

At present on the basis of all our observations, Gerald clearly demonstrates the capacity to be a fine parent and role model (although a rather poor disciplinarian). Victoria clearly enjoys his company and seeks him out for comfort. His interest in enacting this role on a full-time basis appears, however, most questionable. His descriptions of his interactions with Victoria and what he most enjoys about her were all clearly adult-oriented and consistent with his statement about his interests, i.e., that he was "only happy in the art world". Speaking spon-

taneously he related a fantasy of being with Victoria at a Paris cafe sharing her company when she was seventeen.

In general it is difficult to discern whether Gerald does not actively pursue a relationship with Carole and Victoria because he finds conflict so aversive or because he loves the idea/ideal of a family more than the day-to-day experience of one. In either case, he demonstrated relatively limited motivation (in contrast to capacity) to make providing for Victoria's current psychological needs a priority in his life.

### *Michael*

The story of Michael's birth is the story of Michael's life. He reports he "was an identical twin but the other turned into a tumor. I was the survivor". His whole life seems to center around a struggle against loss and rejection. He described a childhood of emotional deprivation in which his Father was older and ill and would not play with him, while his Mother prepared "frozen foods". The day before he graduated from college his Father died. Later his Mother committed suicide and blamed Michael. He married and fathered a son who was born retarded and deformed. He quit law school to support his family, then left them.

Psychological testing suggests he possesses strong unmet needs for affection and dependency and underlying feelings of inadequacy fused with strong aggressive drives. He experiences himself as a victim. This self-concept aids in his extensive rationalization of his aggressiveness.

All of these themes were repeatedly manifest throughout our interviews. Before he was a victim of Carole he was a victim of his parents. He described himself in general as "vulnerable" because he "cares and loves". When asked what he sought in the present litigation he would reply "I'm in no position to demand". He informed the

examiners we could not understand what it was like "not being with your children".

There is an underlying subtle yet clearly aggressive tone in describing his pursuit of heterosexual relations reflecting a desire for domination along with neediness. For example, he spoke proudly of a work situation in which there were "six women under me", talked of a previous girlfriend as "willing to do whatever you wanted" and a current woman friend as willing to "give me as many children as I want". In describing his first sexual encounter with Carole he spoke of when she "gave herself to me". He also asserted that "other men in her life let her do anything; this is not healthy and productive for her".

In addition to being controlling his aggression takes the form of intrusiveness. He asked the examiners a number of questions regarding Gerald (i.e., is he sterile, what did he know of Carole's affairs, etc.). He had surreptitiously checked out whether Carole was subletting her apartment and knew two bedrooms were empty.

At times, with the examiners and with Carole and Gerald he was rigidly argumentative and acted in the style of an interrogator. This seems to be the most direct form his anger takes; i.e., argument supported by facts (pertaining to how he has been wronged). He showed us files he keeps on individuals with whom he comes into contact (related to and unrelated to the current litigation). This obsessive collection of material appears to indirectly satisfy the dual drives of need to belong and be connected with others while serving as a channel for his aggression.

He aggressive pursuit of affection now is turned fully onto Victoria. As he said, "I have nothing to do but think about these things". His lack of other pursuits or friendships is a sad testimony to the self-defeating nature of his angry-victim stance in the pursuit of closeness.

His affection for Victoria contains elements of identification and perhaps magical thinking. He asserts she came through the failed abortion attempt because she was a twin (like himself, her twin was killed). At another time he asserted, "She is from my seed. She is part of me and I am part of her". He referred to her birth as divine intervention and destiny.

He does possess empathy for her. He told the examiners he does want to harm her and fears "If I go to court and win—she'll be pulled—and this could be harmful because her Mother is against it". And he cried when asked what he would do if told the best thing for her would be for him to "walk away".

However, in general, his identification with her, her own neediness and his possessive love toward her cloud his ability to differentiate his needs from hers. For example, he asserted, "All I have is my daughter. She loves me and I love her. There's no reason I should be forced to give her up". More seriously, his attitudes toward her and the depth of his neediness could potentiate a reversal of roles or establishment of a peer versus parental relationship. On the Roth Mother-Child Inventory he endorsed the item, "A child is an adult in small form". On recent visits he has taken her to eat at a French restaurant and twice bought her bouquets of flowers.

As suggested by the foregoing his relationship with Victoria tends to be overly intrusive. Michael says he most enjoys activities in which he makes an impression on her, i.e., exposes her to things, teaches her, etc. He asserted his felt importance of making an effect on her during her "impressionable years" even if that meant moving from city to city. he reported that in addition to at least a standard visitation schedule he would hope to call her three to five times per week and also send her tapes.

It seems likely to us that in the course of these contacts both his own neediness and his tremendous anger at Carole will be communicated. For example, he related to Dr. Drapkin that he tells Victoria when she is away he will be O.K. because he can sleep with her stuffed animals which will keep him company. Victoria has reportedly told her mother after visits that she is sad for her Daddy who is lonely. In addition he told the examiners he would explain to Victoria why he and Carole were not living together by relating that "since we can't get along (her) Mother decided to live with someone else". In Dr. Drapkin's playroom Victoria asked, "How come Mommy doesn't like you?" and Michael responded, "I don't know. I like her". In fact, Victoria demonstrated anger on several occasions toward her Mother in the company of the examiners and with Dr. Drapkin. While this may represent distress associated with the loss of her "Daddy", this form of distress is usually more generalized both in the form it assumes and at whom it is directed. Anger alone directed specifically toward her Mother may very well represent an identification with her "Daddy's" attitude.

All of the foregoing raise serious questions about the quality of relationship Michael could be expected to establish with Victoria at the present time and also how that relationship would impact Victoria's relationship to her Mother. Nevertheless, it is important to note that these qualities were not observed in the interaction observations between Michael and Victoria held following the examiner's court testimony. We are not ready to conclude, however, that these qualities represent "unrealized potentials". Rather there was a highly noticeable modification in Michael's verbal and overt behavior in areas commented upon by the examiner in the previous court testimony (e.g., separation behavior, expressed attitude toward Carole and specific declaration of plan for continued contact with Victoria). On the one hand this indi-

cates Michael is amenable to modifying his behavior toward Victoria in response to feedback. On the other hand, it indicates Michael was more sensitive to impression management in this last series of interviews. Consistent with the latter inference comparison of pre- and post-testimony Minnesota Multiphasic Personality Profiles indicates considerable increase in scales reflecting defensiveness and a wish to extol one's virtues. Also, at times in the interviews Michael would inform the examiners that "I know you're trying to pin me down".

Nevertheless, the interaction observations clearly indicate that a strong positive mutual attachment exists between Victoria and Michael. Despite Carole's reference to him in front of Victoria as Michael (and communication of negative attitude in general, as suggested by the structured Mother-child observations), Victoria still, on occasion, refers to him as Daddy and on every occasion related to Michael with warmth and comfort. More importantly, Michael demonstrated *exceptional parenting skills* in helping her deal with initial separation, in facilitating a transition in care back to Carole and Gerald, in obtaining her compliance, stimulating her interest, and reinforcing her self-pride.

In summary, when (in an individual interview) Michael asserted, "We love each other" he was telling the truth. It is the long-term implications arising from the quality of that love as inferred from data consistent across the clinical interviews, psychological testing and history information that is so troubling. The quality of this love and moreover, specific characteristics of Michael's personality functioning resemble a pattern seen in incestuous fathers. Certainly the data from the clinical interviews suggest an "emotionally incestuous" predisposition. Moreover, a completely blind analysis of the projective tests by a third party Dr. Stephen J. Howard raised questions regarding the *risk* of a sexual relationship be-

tween father and daughter; in all areas his analysis was entirely consistent with the independent interpretation of data by the examiners.

### VICTORIA: PROGNOSTIC IMPLICATIONS OF DIFFERENT PATTERNS OF REARING

In the following table we have attempted to specify the personality characteristics Victoria may be anticipated to exhibit by the conclusion of her childhood given the three major parenting paths open her at this time. In advancing these projections we have taken into consideration 1) Victoria's intellect, temperament, and current coping style, 2) specific observable parenting skills of Michael and Carole, and 3) the potential impact of each as role models, as well as 4) the global parenting style we anticipate they will enact given our individual assessment of each. These speculations do not include the impact Gerald or other (currently unknown) figures may make in Victoria's life. Lastly, since we are more concerned with arriving at the "safest" versus "most optimal" decision regarding Victoria's well-being we have assumed "bad-case" (though not worst-case) scenarios in generating these predictions.

### PROGNOSTIC IMPLICATIONS

PSYCHOLOGICAL DIMENSIONS	"FLUCTUATING MILD EMOTIONAL NEGLECT" (Carole)	ROLE-REVERSAL INDULGANCE (Michael)	CO-PARENTING CONFLICT (Michael as visiting parent)
Realistic appraisal of self, others & environment	Distant; Distrustful but aware of consequences of own actions	Unrealistic Omnipotence	Self-Centered ("The Prize")
Openness to Experience	Moderately Open	Open	Cautious regarding new experience (may elicit conflict)
Emotional Awareness	Identifies feelings Range is restricted No reward for feeling	Difficulty differentiating others' feelings from self	Can define <i>others</i> feeling --not her own
Capacity for Intimacy	Low Warmth Low Trust Low Sensitivity	Trust (when young) Low trust--older Low Sensitivity	Impaired Trust & Warmth High Sensitivity
Self-control	High	Low	Med. frustration tolerance & capacity to delay impulsive Heightened anxiety
Socialization	Low	Modeling questionable Limits appropriate	Low
Problem Solving	Modeling poor, Potential for self-acquisition fair	Very Good	Good in areas related Social Manipulation

PROGNOSTIC IMPLICATIONS—Continued			
PSYCHOLOGICAL DIMENSIONS	"FLUCTUATING MILD EMOTIONAL NEGLECT (Carole)"	ROLE-REVERSAL INDULGENCE (Michael)	CO-PARENTING CONFLICT (Michael as visiting parent)
Independence	High	Low individuation Pseudo-maturity	Self-help good Individuation impair (poor integration)
Interpersonal Achievement	Fair to good (Nurturance from peers)	Play interaction will facilitate intellect, develop.	Other needs take precedent over achievement
Self-Satisfaction	Low	Stimulation seeking Hedonistic Materialistic	Joyless, Self-Centered Limited external investment
Expression of Sexual Identity	Sex fused with Affection	Ambivalent-powerful & bad at puberty. Sexualized	No consistent positive sense of self

It should be readily apparent from reviewing this table that there is no means of arriving at a quantifiable assessment of the relative merits of one plan over another. Furthermore, in light of the highly speculative nature of this enterprise such an effort would be impractical.

Nonetheless, by contrasting the global features of each pattern, differences become clearer. In the first case Victoria might be anticipated to grow-up as a relatively independent and moderately outgoing youngster. She will nonetheless retain a high degree of emotional reservedness and consequently may be at risk of possessing a limited capacity to establish close relationships. She might be expected to maintain an underlying critical and cynical outlook on life. She will probably be highly rebellious while simultaneously exhibiting underlying (repressed) neediness. In the second case Victoria will probably grow up to be an outgoing and self-confident youngster, who will nevertheless experience chronic underlying conflicts around dependency upon others. She may be expected to be demanding of others, and perhaps, also of herself, and have difficulty empathizing with others. In general she will be at risk of developing into a narcissistic and stimulation-seeking adolescent/adult.

In the third instance Victoria is most likely to develop into a self-centered youngster who will experience a high degree of tension (or, more likely, from "character armor"/defenses that will tend to insulate her from others). She will be at risk of developing a "hollow-self" lacking awareness of her own needs and thus often in pursuit of things which will not satisfy. She is likely to be manipulative in her relationships and at risk of experiencing a limited capacity for intimacy along with an impaired ethical structure. She would be at risk of experiencing conflicted feelings and attitudes in many areas and would be likely to exhibit lower scholastic achievement than might be predicted from the other two parenting patterns.

In all fairness, we do not expect Victoria to resemble a youngster nearly as disturbed or distressed as each of the three scenarios suggest. We have learned, working with children, that the human spirit is remarkably resilient. Nevertheless in providing these "bad case scenarios" we think two things may be clear: 1) It is imperative that Michael and Carole re-examine their parenting practices and 2) the different global styles—although each a form of "Abnormal Rearing" have different consequences for Victoria by the time she reaches late adolescence. In the first case she is most likely to be a youngster who is difficult to relate to but who brings distress primarily to herself. In the second case she is more likely to grow up to be a youngster who causes others distress. In the third case she is most likely to experience both intrapersonal and interpersonal problems.

As parents we would wish none of these alternatives on her. As members of the general (as well as professional) community we would select the first alternative. In the meantime we would hope that Michael undertakes a course of intensive self reevaluation so he might subsequently contribute in a more substantial and clearly positive manner to Victoria's welfare.

### RECOMMENDATIONS

1. Michael should be recognized as a legal parent of Victoria.
2. Sole legal and physical custody of Victoria should be awarded to Carole and Gerald Dearing.
3. Michael shall be granted visitation with Victoria for two consecutive weekend days for a period of five hours on each day at six week intervals. In addition, he should have three hour visitation periods with Victoria on her birthday and Christmas day. All dates and times should be specified by court order. Visitation periods shall be unsupervised. Unless other-

wise agreed, transition points shall be at the primary residence of each party. The parties should alternate responsibility for traveling to the residence of the other (on each one or two day visitation period). However, they should share jointly in costs incurred for transportation (beyond 150 miles) per each visitation period. Responsibility for transitions and/or transportation may be delegated by either party to a substitute (nonparental) figure.

4. Telephone contact with Victoria shall be limited to two *scheduled* calls between each six week visitation period. Correspondence should be limited to one parcel or letter between each six week period.
5. It is hoped that Michael will initiate a course of extended (e.g., eighteen months) once or twice weekly individual psychotherapy to address the concerns related in this report. It is similarly hoped that Carole will do the same or at least undertake parenting classes to assist her in ameliorating those concerns relating to her in this report. It is not critical that either party waive privilege in taking this step; that is initiate therapy as part of a stipulation or court order. In fact, it may be preferential that they *not* do so to facilitate effective treatment rapport.
6. It is recommended the court *presently* order a re-evaluation of the family to determine whether the current proposal is, in fact, best meeting Victoria's needs. The re-evaluation should be ordered to commence in June of 1987.
7. It is the intention of these recommendations that contact between the parties, of all forms (correspondence, telephone and direct) be kept to an absolute minimum.
8. When the court determines the extent and manner in which Michael might contribute financially to Vic-

toria's support, we suggest such an order address the issue of prior support checks Michael has written in preceding months which are presently in Carole's possession but still uncashed.

9. We maintain the hope that the next two and a half years can serve as a "cool-down period" for all parties during which they might 1) reduce their currently high levels of interpersonal reactivity, 2) acquire some measure of limited trust, and 3) enhance their personal psychological functioning for Victoria's sake. As observers of human behavior we do not really expect any such changes to take place. We nonetheless believe it will be imperative to Victoria's well-being to have an impartial professional review the actions we take presently to insure they have not been further detrimental to this little girl. At that time the court should be permitted to critically review the previous actions and current psychological status of each party to determine whether Michael's relationship to Victoria should be expanded, terminated, or maintained.

## APPENDIX

### Psychological Dimensions of Well-Being

1. *Realistic appraisal of self, others and environment:* Parents can accurately assess their personal strengths and weaknesses, and can assess and predict their own and others' motives and actions. Young child has an accurate expectation of own abilities and able to predict actions of others.
2. *Openness to experience:* Parents are receptive and accepting of external experiences. Young child takes on new challenges and is curious about the environment.
3. *Emotional awareness:* Parents are introspective and can identify, differentiate, and accept a normal range of feelings regarding themselves and others. Young child possesses an emerging capacity to identify different feelings in self and others.
4. *Capacity for intimacy:* Parents manifest trust, empathy and appropriate nurturance toward others. Young child manifests trust, warmth and sensitivity.
5. *Self-control:* Parents exhibit age-appropriate control over internal (e.g., freedom from distractibility and delay of gratification) and external (e.g., stress management and frustration tolerance) sources of motivation. Young child demonstrates age-appropriate attention span, ability to delay gratification and tolerance of anxiety and frustration.
6. *Socialization:* Parents and children demonstrate responsibility by respecting the rights and property of others.
7. *Problem solving:* Parents and children employ logic and constructive fantasy in exploring alternatives to problems, and appreciating the consequences of their solutions.

8. *Independence*: Parents exhibit age-appropriate physical, social, and emotional independence (i.e., individuality). Young child develops age-appropriate self-help skills and can play alone.
9. *Interpersonal achievement*: Parents affect the environment to achieve rewards through personal initiative, assertiveness, and industry. Young child initiates interaction, openly expresses needs, and persists at difficult tasks.
10. *Self-satisfaction*: Parents and children affect their environment for personal satisfaction through play, creativity, humor, hobbies and spirituality.
11. *Expression of sexual identity*: Parents and children exhibit socially condoned and personally satisfying expressions of sexual identity.

# **DECLARATION OF MICHAEL HIRSCHENSOHN**

I, Michael Hirschensohn, hereby declare:

1. I am the Plaintiff in this action. If called to testify in this matter I would testify to the following information, all of which is known to me of my own personal knowledge. The exhibits attached to this Declaration are photocopies of original documents. The original documents are in the possession of my attorneys and are available for inspection through their offices.

2. Since July of 1981 when Victoria Dearing was two months old, I have considered myself to be the father of Victoria Dearing and I have acted as her father. I believe that I am her father and that she was born as a result of sexual intercourse between myself and her mother which occurred in September, 1980.

3. For the past eight years I have been engaged in various businesses in the Caribbean Islands, including involvement with a television game show in Puerto Rico and various businesses related to the tourist industry in the United States Virgin Islands. However, my principal place of residence for the past sixteen (16) years has been Los Angeles, California. In conjunction with the tourist businesses, since 1979 I have spent part of each year in the United States Virgin Islands and part of each year at my home in Los Angeles.

4. During June, 1978, I was residing in Los Angeles, California in Playa Del Rey. During that summer, I met the Defendant in this case, Carole Singleton. I spent July 4, 1978 with Carole and we had sexual intercourse during the middle of July, 1978. During the time we were together in the Summer of 1978, Carole was depressed and crying and said she was very unhappy with her marriage to Gerald Dearing.

5. In November, 1978, I returned to the United States Virgin Islands.

6. From January 5, 1979 to January 9, 1979, Carole visited with me in St. Thomas and we again had sexual intercourse with each other. Throughout the remainder of that year, 1979, I had sporadic contact with Carole both by telephone and letter.

7. At the end of June, 1980, I returned to Los Angeles from St. Thomas. I arrived in Los Angeles the same day that Gerald Dearing was leaving Los Angeles. Carole and I began to see each other on a regular basis during July, August and September, 1980. Even when Gerald, Carole's husband, was in Los Angeles during that time, Carole and I would continue to see each other. Carole told me that she and Gerald were using separate bedrooms with her bedroom being the one in the back of the apartment, the one I could see from my nearby apartment. Carole would wave to me each night we were not together from her bedroom and allowed me to watch while she readied herself for, and got into, her bed. Carole told me that she and Gerald had separate bedrooms because they were no longer having sexual intercourse with each other.

8. On August 15 and 16, 1980, Carole and I went to Oxnard to visit with her brother. We stayed at the Casa Sirena Motel. A copy of the bill and the credit card charges are attached as Exhibit A. Carole used my credit card at the restaurant and to pay the hotel bill. She signed her name as "Carole L.H." We had sexual intercourse with each other while staying at the Casa Sirena.

9. During the first week of September, 1980, I was with Carole and again had sexual intercourse with her. We would regularly go to a place called Hot Tub Fever and we had sexual intercourse there with each other and in other locations on several occasions during the early part of September, 1980.

10. On September 17, 1980 and September 18, 1980, we were again in Oxnard at the Casa Sirena. The bill

and charge card slip are attached as Exhibit B. During our stay, we had sexual intercourse with each other several times.

11. On September 22, 1980, Carole and I saw a chiropractor named Dr. W.T. Arnold. Carole used the name Carole Hirschensohn for the visit and I paid for the visit. A copy of the check is attached as Exhibit D.

12. During 1980, Carole was having difficulty with the Internal Revenue Service and faced the possibility of a criminal indictment. The Internal Revenue Service was willing to accept payments to resolve the matter. At her request, on October 2, 1980, I loaned Carole \$1,000.00. That loan has never been repaid. A copy of the check is attached at Exhibit C.

13. On October 4, 1980, Carole left for Paris for a modeling job. Soon after arriving in Paris, Carole called me in Los Angeles to tell me that she was pregnant and was going to have an abortion. I asked Carole to reconsider, to divorce Gerald as we had discussed and to marry me so that we could raise a family. She said she could not do that at the time because of her problems with the Internal Revenue Service.

14. By a letter dated October 7, 1980, but which must have been written on November 7, 1980, Carole told me that she had had the abortion on October 31, 1980. A copy of that letter and the envelope in which it was mailed is attached as Exhibit E.

15. Sometime between January 10 and 15, 1981, I found on my answering machine in St. Thomas a message from Carole saying that it was urgent that she see me as soon as possible. I was on my way to Florida at the time and extended my trip to take in Los Angeles. Carole had returned to Los Angeles on January 17, 1981.

16. On January 18, 1981, I went to Carole's apartment at her request. She told me that she was five months

pregnant and that the abortionist had terminated one fetus but that there had been twins and the other fetus had been missed.

17. My previous child from my first marriage had been born with severe developmental disabilities as a result of a genetic disorder known as Lawrence-Moon Beidel syndrome. Carole was quite concerned that this child might have the same problems. As a result of that concern, between January 19 and 26, 1981, we spoke with personnel at the Genetic Clinic at the University of Southern California. The physician at the Clinic, Bill Herbert, told us that the odds were against a recurrence and that the pregnancy could continue.

18. On January 27, 1981, I left Los Angeles to return to St. Thomas so that I could look after my business.

19. In mid-March, 1981, Carole called me and told me that she still loved me.

20. On May 11, 1981, Victoria was born in Los Angeles.

21. Sometime between May 11 and 18, 1981, Carole called me in St. Thomas to tell me that the baby had been born and that the baby was a girl she had named Victoria. She also told me that the baby was one month premature and had been born with a collapsed lung.

22. On June 27, 1981, I returned to Los Angeles for the summer and I was living in Playa Del Rey and sharing a house with Bill Peiffer and Barbara Blazer.

23. At the end of July, 1981, Carole came up to me on the beach and slipped something in my pocket. They were baby pictures of Victoria. She had written the date of the pictures on the back. Copies of those photographs are attached at Exhibit F.

24. After that day, Carole began to come to my apartment with the baby. During several of those visits, she

asked that I have sexual intercourse with her and we began to have regular sexual intercourse while the baby was napping.

25. During one of her visits to my apartment Carole told me that she knew I was Victoria's father. She said that she wanted to take whatever tests would prove her feelings. She said that if the tests showed I was the father, she would get a divorce from Gerald after she told him the truth and come to St. Thomas to live with me. During one of those visits, Carole also asked me for my family photograph album and my baby pictures. I gave those to her and she has refused to return them to me despite my request that she do so.

26. On September 1, 1981, I gave Carole \$1,000.00 to pay her rent and other bills.

27. On September 26, 1981, Gerald moved to New York City to live as part of the agreed to separation between himself and Carole.

28. During September and October, 1981, Carole, Victoria and I were together on a regular basis. In late October, 1981, we went to a Jacoby and Myers office as well as the office of a private attorney in an effort to learn what we were facing legally in order to have me be recognized as Victoria's father.

29. On October 29, 1981, Carole, Victoria and I went to UCLA to have blood tests done to determine paternity. On October 30, 1981, I returned to St. Thomas. On November 6, 1981, I received the results of the blood tests which showed a 98.07 percent probability that I was Victoria's father. A copy of that report is attached as Exhibit G.

30. Carole and I corresponded regularly between October and December, 1981 and I continued to send her money for various expenses.

31. In January, 1982, Carole and Victoria come to live with me in St. Thomas. We rented a home and began to invite people to our home. Carole told everyone that I was Victoria's father and we held ourselves out as a nuclear family. Carole signed the lease for the home as Carole Hirschensohn. A copy of the lease is attached at Exhibit H. During February, 1982, Carole's mother came to visit us in St. Thomas and stayed with us at our home.

32. In March of 1982, Carole left St. Thomas to go back to Los Angeles. At that time, she said she would return to St. Thomas as soon as she took care of some things in Los Angeles.

33. Carole continued to live in Los Angeles from March, 1982 through the remainder of that year. Gerald was in New York and not living with her. Carole had a new boyfriend named Scott Krooph. During November, 1982, I visited with Victoria twice while I was in Los Angeles. Although I requested additional visits, Carole was reluctant to arrange such visits.

34. In November, 1982, I finally decided that if I was to have the relationship I wanted with my daughter, I would need to file some legal action. Therefore, I commenced this litigation and had Carole served with the papers.

35. Carole and I had irregular communications between December, 1982 and March, 1983. Because of my business, I spent some time in St. Thomas during that time.

36. In March, 1983, I was in Los Angeles and spent some time with Victoria. During my visit, Carole told me that she was going to New York.

37. In May, 1983, Carole and I met in New York and I again visited with Victoria. During that visit, Carole told me that she was unhappy with Gerald and intended to leave him and return to Los Angeles. She

then spent several nights with me at the apartment of a friend and I saw Carole and Victoria regularly while I was in New York. During that time, Carole and I sat down together and prepared a handwritten document which indicated I was Victoria's father. Carole told me she would forward that document to her lawyer so that he could prepare a formal stipulation setting forth the fact that I was Victoria's father.

38. In June, 1983, Carole and Victoria returned from New York and Carole and the lawyers began discussing how to resolve this litigation consistent with the agreement Carole and I had reached in New York.

39. In July, 1983, I returned to Los Angeles and agreed that our attorneys should complete the stipulation - they had been working on which would resolve this litigation.

40. During July, 1983, Carole was living with her mother while she waited to get back to her own apartment which she had sublet. During that time, Carole asked me to live with her and Victoria in her apartment when it again became available in August, 1983.

41. In August, 1983, Carole, Victoria and I all moved into Carole's old apartment. Carole told her friends and family that I was Victoria's father and she started to have Victoria call me Daddy.

42. From July, 1983 through April, 1984, Carole, Victoria and I lived together in the apartment in Playa Del Rey. I regularly paid Carole at least \$2,000.00 per month for the support of herself and Victoria and we maintained a joint checking account at Wells Fargo Bank, Marina Del Rey Branch.

43. During November, 1983, I returned to St. Thomas to care for my business and to begin the process of selling my holdings so that I could return to live with my family on a full-time basis. As we had agreed, during

that same time Carole and Victoria went to New York so that Carole could tell Gerald of our plans. I returned to Los Angeles in December, 1983 and Carole, Victoria and I attended a Christmas party at her parent's home. During that party, Carole once again told everyone present that I was Victoria's father and she showed everyone the diamond engagement ring I had given her.

44. On January 23, 1984, I received a telephone call telling me that my key employee in St. Thomas had been in an accident and that my presence was absolutely necessary if my businesses were to survive. As a result of that call, I immediately left for St. Thomas.

45. While I was in St. Thomas, Carole, Victoria and I regularly spoke on the telephone and I continued to send Carole at least \$2,000.00 each month. In March, 1984, Carole signed the stipulation which had been worked out by our attorneys and ourselves. A copy of that Stipulation is attached hereto as Exhibit I.

46. I returned to Los Angeles on March 23, 1984. Carole and I continued to live together and Carole continued to introduce me to people, including doctors treating Victoria, as Victoria's father. I took Victoria to her nursery school and the people at the school knew me as Victoria's father. On Easter we had a gathering of Carole's family at our home where, as before, it was acknowledged that I was Victoria's father. Victoria and I had, and have, a warm and loving father-daughter relationship and I attempted to remain with Carole in order to preserve our home for Victoria. Unfortunately, Carole and I simply could not get along and in May, 1984, I moved out of the apartment where I had been living with Carole and Victoria. Since that time, I have regularly contributed \$500.00 per month for Victoria's support and I have seen Victoria at every opportunity.

47. Since the day on the beach in July, 1981 when Carole first gave me the pictures of Victoria to the pres-

ent time, I have considered Victoria to be my daughter and have acted toward her as my daughter. We have spent considerable periods of time together, particularly in early 1982 in St. Thomas and from July, 1983 through April, 1984 in Los Angeles. Victoria calls me Daddy and knows me as her Daddy. Even though I now see her less, when she does see me, she continues to refer to me as Daddy. During my last visit with her, Victoria told me that she loves and misses me and that she would like me to visit her at her house.

48. At least since November, 1981, Carole has consistently told her family and friends that I am Victoria's father and we have participated in various family events, including a birthday party for Carole in February, 1982, Christmas, 1983, and Easter, 1984. At each of these events, I was introduced as, and treated as, Victoria's father.

49. My relationship with Victoria is important to me and I desire to be able to act as her father. I am fully prepared to continue to support her and to provide for any special education or other needs she may have.

50. I would never have become involved with Victoria and taken on the responsibilities as her father had Carole not told me I was the father and arranged to confirm that by having the blood tests done which indicated the high probability that I was Victoria's father.

51. At all time since the blood tests, I have been treated as, and acted as, the father to Victoria Dearing. She knows me as her father and she treats me as her father.

52. On several occasions during our relationships, Carole told me that she had never been pregnant as a result of sexual intercourse with Gerald Dearing.

53. During the course of our relationship, Carole also told me that Gerald had taken the same type of blood

test that she, Victoria and I had taken at UCLA and that, according to her, the results indicated in it was highly unlikely that Gerald was the father of Victoria.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 27th day of December, 1984, at \_\_\_\_\_, St. Thomas, Virgin Islands.

/s/ Michael Hirschensohn  
MICHAEL HIRSCHENSOHN

On this the 27th day of December, 1984, before me personally appeared Michael Hirschensohn who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that he executed it.

/s/ [Illegible]  
Notary Public

SUPERIOR COURT FOR THE STATE OF  
CALIFORNIA FOR THE COUNTY OF LOS ANGELES

\_\_\_\_\_  
No. CF 022753

MICHAEL HIRSCHENSOHN  
*Plaintiff,*

vs.

CAROLE SINGLETON, aka CAROLE DEARING, *et al.,*  
*Defendant.*

\_\_\_\_\_  
**STIPULATION FOR JUDGMENT**

CAROLE SINGLETON, also known as CAROLE DEARING, Defendant herein, represented by LARRY M. HOFFMAN, and mother of VICTORIA CAROLE DEARING, represented by LESLIE SHEAR, and MICHAEL HIRSCHENSOHN, Plaintiff herein represented by NEWMAN, AARONSON, KREKORIAN, VANAMAN by JOEL S. AARONSON, stipulate to the following Judgment and request judicial order based upon the following:

a. That MICHAEL HIRSCHENSOHN is the biological father of VICTORIA CAROLE DEARING and shall be so designated on the birth certificate of VICTORIA CAROLE DEARING, born May 11, 1981, in Los Angeles, California.

b. That VICTORIA CAROLE DEARING may be known throughout her minority by any surname her mother, CAROLE SINGLETON, may choose for her.

c. That Plaintiff shall not commence any action or proceeding, or in any other way attempt, to change the

name of VICTORIA CAROLE DEARING from that which is designated on her birth certificate.

d. That MICHAEL HIRSCHENSOHN shall pay directly to CAROLE SINGLETON, as and for support for VICTORIA CAROLE, the sum of \$500.00 per month, commencing June 1, 1983, and continuing until VICTORIA CAROLE becomes of majority, emancipated, dies or further order of the court.

e. That MICHAEL HIRSCHENSOHN is given the right to visit VICTORIA CAROLE at such times and places as may be mutually argued upon by the parties or further order of the court.

f. That MICHAEL HIRSCHENSOHN shall create a Will devising all of his worldly goods to VICTORIA CAROLE. That said Will may be changed subject only to his having fathered other children after the birth of VICTORIA CAROLE, in which case the Will may contain a provision that his issue would share and share alike his estate.

g. Both parties agree that notwithstanding this Stipulation for Judgment, GERALD DEARING, a Defendant whose default has been taken, may continue to have contact with VICTORIA CAROLE as a stepparent.

h. MICHAEL HIRSCHENSOHN further agrees not to make the terms of this Stipulation public beyond those individuals with needs to know.

i. MICHAEL HIRSCHENSOHN further agrees to be responsible to pay LESLIE SHEAR, ESQ., appointed counsel for VICTORIA CAROLE, for any and all legal fees and all legal fees and costs charged on her behalf.

DATED:

/s/ Carole Singleton Dearing  
CAROLE SINGLETON,  
aka CAROLE DEARING

/s/ Michael Hirschensohn  
MICHAEL HIRSCHENSOHN  
NEWMAN, AARONSON,  
KREKORIAN, VANAMAN

By: /s/ Joel S. Aaronson  
JOEL S. AARONSON

DATE: April 12, 1984

Approved as to Form and Content:

\_\_\_\_\_  
LESLIE SHEAR

\_\_\_\_\_  
LARRY M. HOFFMAN

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

---

Case No. CF 022753

MICHAEL HIRSCHENSOHN,  
*Plaintiff,*

vs.

CAROLE SINGLETON aka CAROLE SINGLETON  
DEARING, *et al.,*  
*Defendants.*

---

And Related Cross-Actions

---

Filed Oct. 22, 1985

---

**JUDGMENT**

On January 28, 1985, the Court duly granted Defendant, Gerald Dearing's motion, pursuant to Section 437c of the Code of Civil Procedure for an order granting Summary Judgment as to Plaintiff's First Amended Complaint to Establish Paternity and to Establish Father/Child Relationship and Defendant, Victoria Carole Dearing, a minor, Cross-Complaint for Declaratory Relief to Establish Paternity and to Establish Father/Child Relationship.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant, Gerald Dearing is the father of VICTORIA CAROLE DEARING, born May 11, 1981.

Approved as to Form and Content:

/s/ Leslie Ellen Shear  
LESLIE ELLEN SHEAR, Guardian  
ad Litem, and Attorney for  
minor VICTORIA CAROLE DEARING

/s/ Joel S. Aaronson  
JOEL S. AARONSON, Attorney for  
Plaintiff MICHAEL HIRSCHENSOHN

/s/ Larry Hoffman  
LARRY HOFFMAN, Attorney for  
Defendant CAROLE SINGLETON DEARING

/s/ Glen H. Schwartz  
GLEN H. SCHWARTZ, Attorney for  
Defendant GERALD DEARING

Dated: October 22, 1985.

/s/ Stephen M. Lachs  
STEPHEN M. LACHS  
Judge of Superior Court

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

MICHAEL H.,

*Appellant,*

and

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,  
*Appellant,*

v.

GERALD D.,

*Appellee.*

On Appeal from the Supreme Court of California

**BRIEF FOR APPELLANT MICHAEL H.**

ROBERT A.W. BORAKS  
(Counsel of Record)  
BORAKS & LECKAR  
1818 N Street, N.W.  
Washington, D.C. 20036  
(202) 785-3240

GEORGE KAUFMANN  
RONALD K. HENRY  
PAUL R. TASKIER  
DICKSTEIN, SHAPIRO & MORIN  
2101 L Street, N.W.  
Washington, D.C. 20037  
(202) 785-9700

*Attorneys for Appellant  
Michael H.*

*Of Counsel:*

JOEL S. AARONSON  
NEWMAN, AARONSON, KREKORIAN  
& VANAMAN  
14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

### QUESTION PRESENTED

Subject to exceptions not applicable herein, § 621 of the California Evidence Code establishes a conclusive presumption of paternity in the husband of a mother whose child was born in wedlock. The question presented is whether § 621 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when it operates to deny a hearing to a child's biological father and thereby to terminate his parental rights although he has demonstrated "a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
OPINION BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	2
PROCEEDINGS BELOW .....	5
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	11
I. Appellant's Demonstrated Parental Commit- ment To His Child Establishes A "Liberty" In- terest Entitled To Constitutional Protections....	11
II. The California Statute Violates the Due Proc- ess Clause Because It Deprives Petitioner of His Liberty Interest Without a Hearing .....	14
III. The California Statute Violates The Equal Pro- tection Clause Because It Invidiously Discrimi- nates Against Biological Fathers .....	27
CONCLUSION .....	32

## TABLE OF AUTHORITIES

CASES	Page
Armstrong v. Manzo, 380 U.S. 545 (1965) .....	8, 15, 25
Bates v. Little Rock, 361 U.S. 516 (1960) .....	23
Board of Regents v. Roth, 408 U.S. 564 (1972) ....	9, 11, 15, 20, 22
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) .....	7, 15
Caban v. Mohammed, 441 U.S. 380 (1979) .....	6, 7, 10, 11, 12, 14, 28, 29
Carey v. Population Services International, 431 U.S. 678 (1977) .....	23
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) .....	17
Estate of Cornelious, 35 Cal.3d 461, 198 Cal.Rptr. 543, 674 P.2d 245, appeal dsimissed, 466 U.S. 967 (1984) .....	14
Goss v. Lopez, 419 U.S. 565 (1975) .....	9
Grannis v. Ordean, 234 U.S. 385 (1914) .....	15
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) .....	15
Kovacs v. Cooper, 336 U.S. 77 (1949) .....	27
Kusior v. Silver, 55 Cal.2d 603, 7 Cal.Rptr. 129, 354 P.2d 657 (1960) .....	8, 19
Lassister v. Department of Social Services, 452 U.S. 18 (1981) .....	8, 18
Lehr v. Robertson, 463 U.S. 248 (1983) .....	i, 6, 7, 11, 12, 13, 14
Levy v. Louisiana, 391 U.S. 68 (1968) .....	26
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) .....	8, 20, 22
Michelle W. v. Ronald W., 39 Cal.3d 354, 216 Cal. Rptr. 748, 703 P.2d 88 (1985) .....	19, 20, 25, 30
Mills v. Habluetzel, 456 U.S. 91 (1982) .....	26
Palmore v. Sidoti, 466 U.S. 429 (1984) .....	25, 26
Pickett v. Brown, 462 U.S. 1 (1983) .....	26
Perry v. Sindermann, 408 U.S. 593 (1972) .....	22
Quilloin v. Walcott, 434 U.S. 246 (1978) .....	6, 7, 11, 12, 13, 14

## TABLE OF AUTHORITIES—Continued

	Page
Rivera v. Minnich, — U.S. —, 107 S.Ct. 3001 (1987) .....	12
Santosky v. Kramer, 455 U.S. 745 (1982) .....	8, 18
Smith v. Organization of Foster Families, 431 U.S. 816 (1977) .....	11
Stanley v. Illinois, 405 U.S. 645 (1972) .....	<i>passim</i>
Vlandis v. Kline, 412 U.S. 441 (1973) .....	8, 16, 17, 23
Weinberger v. Salfi, 422 U.S. 749 (1975) .....	17
Zablocki v. Redhail, 434 U.S. 374 (1978) .....	10, 27, 29

## CONSTITUTION AND STATUTES

## United States Constitution:

Fourteenth Amendment .....	<i>passim</i>
28 U.S.C. § 1257 .....	2
28 U.S.C. § 2403(b) .....	2
California Evidence Code, § 621 .....	<i>passim</i>

## MISSCELLANEOUS

S. Clemens, Letter to Annie Webster, September 1, 1876 .....	12
Comment, "California's Conclusive Presumption of Legisimacy. <i>Jackson v. Jackson</i> and Evidence Code Section 621," 19 Hastings L.J. 963 (1968) ..	17

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-746

---

MICHAEL H.,  
and *Appellant,*

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,  
*Appellant,*

v.

GERALD D.,  
*Appellee.*

---

**On Appeal from the Supreme Court of California**

---

**BRIEF FOR APPELLANT MICHAEL H.**

---

**OPINION BELOW**

The Superior Court of California wrote no opinion. The opinion of the Court of Appeal of the State of California, Second District, Division Three, is reported at 191 Cal.App.3d 995, 236 Cal.Rptr. 810. It is reprinted in Appendix B to Appellants' Jurisdictional Statement.\*

---

\* The Jurisdictional Statement is hereafter cited as "J.S." A Supplemental Appendix is hereafter cited as "J.S.S."

## JURISDICTION

The judgment of the Supreme Court of California, denying appellants' petition for review, was filed on July 30, 1987. A notice of appeal to this Court was duly filed in the Court of Appeal, Second District, Division Three, of California, on October 28, 1987. This appeal was docketed in this Court on October 28, 1987, within 90 days of the judgment below.

This Court has jurisdiction under 28 U.S.C. § 1257. The provisions of 28 U.S.C. § 2403(b) may be applicable to this appeal.

Probable jurisdiction was noted on February 29, 1988.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of § 1 of the Fourteenth Amendment to the United States Constitution. This case also involves California Evidence Code § 621. These provisions are set forth at J.S. 2-4.

## STATEMENT OF THE CASE<sup>1</sup>

In 1978, Michael H. and Carole D. were neighbors in Playa del Rey, California. Carole had been married to Gerald D. since 1976. In the summer of 1978, Carole and Michael began an extramarital affair which continued until October 1980, when Gerald moved to New York and Carole left Los Angeles for a sojourn in Paris. A. 1, 43, 73-74.<sup>2</sup> Soon after Carole arrived in Paris, she called

<sup>1</sup> Because the case was dismissed before any evidentiary hearing was permitted, and before Michael H. was allowed to introduce in court *any* evidence in support of his position, the record is necessarily limited to the undisputed facts noted in the court's opinion, by the affidavits of the parties and the report of the appointed expert.

<sup>2</sup> "A." refers to the record Appendix in this Court.

Michael, told him that she was pregnant with his child and that she intended to abort the fetus. Michael asked Carole to reconsider her decision, asking that she divorce Gerald, marry him and have the child. Subsequently, Carole wrote Michael that she had had an abortion on October 31, 1980. In January of 1981, Carole called Michael to inform him that she had been pregnant with twins, that the abortion had terminated only one of the fetuses and that she was five months pregnant with the remaining fetus.<sup>3</sup> A. 75.

Following this, Gerald returned to Los Angeles and reunited with Carole. Victoria D. was born on May 11, 1981. Carole called Michael to inform him of the birth.

In September of 1981, Gerald and Carole separated again. A. 77. In the following month, Carole, Michael and Victoria went to a clinic at the University of California at Los Angeles for a Human Leukocyte Antigen (HLA) test to determine the child's biological paternity. The test showed a 98.07% probability that Michael was Victoria's biological father. A. 10, 77. From that point on, Michael has continually, with enormous persistence and at great personal expense, sought to establish and maintain his parental relationship with Victoria. He has fed and housed both Carole and Victoria and, indeed, has provided financial support to Carole and the child even when they were not living under his roof. His love for and attention to Victoria has been constant and unswerving, and he has availed himself of every opportunity to provide her with warmth, comfort and parental involvement.

In January 1982, Carole and Victoria moved to St. Thomas to live with Michael. A. 44. They leased a house together; Carole signed the lease as "Carole Hirschen-

<sup>3</sup> Because Michael had a child by a previous marriage with a serious genetic disorder causing profound retardation, called Lawrence-Moon Beidel syndrome, he and Carole consulted the Genetic Clinic at the University of Southern California. A. 76.

son"; she held Michael out as Victoria's father, and the three lived together as a family unit. In March 1982, Carole took Victoria to Los Angeles for a visit, promising to return to Michael. A. 78. Instead, for approximately the following year, Carole lived with a new boyfriend, Scott K., and then returned again to Gerald. A. 44, 78.

In the fall of 1982, Michael came to Los Angeles to visit Victoria. Carole then attempted to restrict his visits with the child and, in November 1982, Michael filed the filiation suit that has led to this appeal. A. 78. On April 12, 1983, a guardian *ad litem* was appointed for Victoria.<sup>4</sup> J.S.S. 6.

In July 1983, Carole, having separated again from Gerald—who returned to New York—invited Michael to live with her and Victoria in Los Angeles. A. 79. The three resumed living together as a family in August 1983. Carole told her friends and family that Michael was Victoria's father and encouraged Victoria to call Michael "Daddy", a term the child used regularly. A. 79; J.S. B4. Michael supported Carole and Victoria and maintained a joint bank account with Carole. A. 79. During this period, Michael and Victoria developed a warm, close and loving parent-child relationship.

In March 1984, Michael and Carole agreed to a Stipulation intended to resolve the then-pending filiation suit. A. 83. As of that time, Gerald had never sought to intervene in the suit to take a position as to his paternity. The Stipulation, signed by Carole and Michael,<sup>5</sup> acknowledged Michael's paternity, obligated him for continuing financial support and made Victoria his sole heir. In the

<sup>4</sup> Throughout this litigation, the guardian *ad litem*, who has been independent of all the other adults in the case, has consistently taken the position that a *de facto* father-child relationship existed between Victoria and Michael which it was in Victoria's best interest to preserve. J.S. B6.

<sup>5</sup> Carole later instructed her attorney not to file the Stipulation in court. J.S. B4.

following month Carole decided to end her relationship with Michael. A. 83.

Following Carole's decision to leave Michael, both Victoria's guardian *ad litem* and Michael sought *pendente lite* visitation between Michael and Victoria. The Superior Court appointed a psychologist to evaluate the parties and submit a recommendation. J.S.S. 11. The expert administered a battery of psychological tests to Michael, Carole, Victoria and Gerald, spent hours interviewing each of them and observing their interactions, and submitted a 20-page report. A. 41. The report, in essence, concluded that the child was positively attached to all three parental figures, "*principally and equally*" (emphasis in original) to Michael and Carole. A. 48. The report recognized the importance to the child that Michael remain a part of her family because "[the evaluators] perceived Michael H. as the single adult in Victoria D.'s life most committed to caring for her needs on a long-term basis." A. 51. The report also commented on the beneficial nature to Victoria of a relationship with Michael, noting that "it would be unnecessarily hurtful to deprive her of his affection and intellectual stimulation." A. 52. It further addressed the "strong positive mutual attachment" between Michael and the child and Victoria's attitude of "warmth and comfort" toward him. A. 63. Following the submission of the report, the parties entered into a stipulated resolution of the *pendente lite* visitation issue which was entered as an order on October 13, 1984. J.S. B5.

#### PROCEEDINGS BELOW

On November 18, 1982, Michael H. initiated this action in California Superior Court against Gerald D., Carole D. and Victoria D. to declare his paternity of Victoria D. As noted *supra*, the trial court appointed a guardian *ad litem*/attorney to represent the interests of Victoria D., and the guardian *ad litem* thereupon filed a cross-com-

plaint against Michael H., Gerald D. and Carole D. seeking a declaration of a legal or *de facto* parent-child relationship between Victoria D. and Michael H.

Following the submission of the report of the court-appointed psychologist and a stipulation among the parties to a visitation schedule, Gerald D. filed a Motion for Summary Judgment predicated on the absolute bar imposed by the conclusive presumption of section 621 of the California Evidence Code. Appellants opposed the motion on the ground that section 621 was unconstitutional as repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On January 28, 1985, the trial court granted the motion for summary judgment, dismissing Michael H.'s Petition for Declaration of Paternity and the guardian *ad litem's* request for declaration of a parent-child relationship without an evidentiary hearing on any issue.

The due process and equal protection challenges were made again on appeal to the Court of Appeal of the State of California, Second District, Division Three. The constitutional claims were squarely decided by that court in affirming the Judgment of the Superior Court. J.S. B14-B18.

A Petition for Hearing was thereafter timely filed with the Supreme Court of California reiterating appellants' constitutional claims. The California Supreme Court denied appellant's petition for review on July 30, 1987.

#### SUMMARY OF ARGUMENT

I. This Court has in four cases considered the extent to which a natural father's biological relationship with his child is entitled to protection under the Due Process Clause, even if the child is not the product of a marital union. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248

(1983). The basic principle enunciated by the Court is that if an unwed father has demonstrated a full commitment to his paternity by accepting its burdens, has developed a relationship with his child, and has cared for the child in the manner expected of a parent—by assuming financial, personal or custodial responsibilities—the Constitution recognizes that he has a “liberty” interest in his relationship to his child. *Lehr*, 463 U.S. at 260-262; *Caban*, 441 U.S. at 389, n.7; *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. at 651-652.

In this case, Appellant Michael H. has amply demonstrated a full parental commitment to his child and has thereby “developed [a] parent-child relationship [as] was implicated in *Stanley*, and *Caban*.” See *Lehr*, 463 U.S. at 621. Accordingly, he should be deemed to have a fundamental “liberty” interest entitling him to protection under the Due Process Clause of the Fourteenth Amendment and deserving of respect in determining his rights under the Equal Protection Clause.

II.A. Section 621 of the California Evidence Code declares that “the issue of a wife cohabiting with her husband \* \* \* is conclusively presumed to be a child of the marriage.” The only exceptions provided for therein are where the husband is impotent or sterile, and where the husband (alone), or the wife, together with the father, petition for a blood test to establish paternity within two years of the birth of the child.

In a case such as this, where a putative biological father who is not the mother's husband has established a parental relationship in the ways contemplated by *Lehr* and its antecedents, the statute extinguishes that father's liberty interests, not on the merits after a full hearing and careful consideration of all the interests affected, but by the legal fiction of conclusive presumption. It thereby denies such a father “due process of law—using that term in its primary sense of an opportunity to be heard, and to defend [his] substantive rights”. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930)

(Brandeis, J.). A corollary of this constitutional requirement is "that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Accordingly, in *Stanley v. Illinois*, *supra*, this Court held that a father had been deprived of his liberty interest "in children he has sired and raised" (405 U.S. at 651) without due process by Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children, whereby the state took custody of the children on the death of the mother without providing any hearing on the father's parental fitness. The fact conclusively presumed by § 621 is no more "necessarily or universally true" (*Vlandis*, 412 U.S. at 452) than the presumptions which were struck down in *Stanley* and *Vlandis*; nor, given present-day technology, is the state without "reasonable alternative means" (*id.*) for determining the identity of the actual father. Thus, by denying the biological father his liberty interest and "companionship, care, custody, and management" of his child (*Stanley*, 405 U.S. at 651) without a hearing, § 621 unconstitutionally deprives him of due process of law. See also *Lassiter v. Department of Social Service*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (each of which decides that a parent may not be divested of his or her rights as such without a hearing).

B. The court below sought to support the constitutionality of § 621 and its application in this case on the basis that the "conclusive presumption is actually a substantive rule of law \* \* \*." J.S. B11, citing *Kusior v. Silver*, 55 Cal.2d 603, 619, 7 Cal.Rptr. 129, 140, 354 P.2d 657, 668 (1960). On this view, the Court balanced appellant's right to a hearing against the state interests which were said to be served by § 621. This was fundamental error. In *Logan v. Zimmerman Brush Co.*, 452 U.S. 422 (1982), the Court reiterated that "it has become

a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property [or liberty] interest". (*Id.* at 433, quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-571, n.8 (1972) (emphasis in *Roth*)). Under the Due Process Clause, that right is not subject to being balanced away. "On the other hand," said the Court, "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved'." 455 U.S. at 434, quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

Without a hearing, it cannot be determined whether the state interest which § 621 assertedly serves would in fact be adversely affected by recognizing the father's paternity and his parental rights. For example, the state's interest "in the integrity of the family unit," J.S. B11, B15-B16, is in fact furthered only if a stable family consisting of the child, the mother and *the husband* exists in fact. Its existence may not be *presumed*, since it is far from universally true that such a family is stable where the mother has had a child with a man other than the husband, and the biological father has assumed and exercised responsibility for the care of the child sufficient to establish a liberty interest in his relationship with the child. So too, there must be a hearing to ascertain whether the liberty interest and the state interest can be accommodated, for example, by recognizing the true father's paternity and according him visitational rights. Likewise, without a hearing a court cannot know whether the state's unquestionable interest in the welfare of the child would be advanced or hindered by terminating its relationship with its father. Nevertheless, as construed below, § 621 categorically overrides the father's liberty interest in his relationship with his child without regard to what a hearing would show as to whether these assertedly countervailing state interests are truly implicated, and if so, how these interests and that of the father can best be effectuated.

III. Appellant was also denied his rights under the Equal Protection Clause by the operation of § 621. Because § 621 denies appellant and other fathers similarly situated a hearing in which they can establish their paternity and their parental rights, it is indistinguishable from the statute which was held in *Stanley v. Illinois* to be "inescapably contrary to the Equal Protection Clause", 405 U.S. at 658. Moreover, like the statute which was struck down in *Caban v. Mohammed* on equal protection grounds, § 621 unjustifiably discriminates between biological parents. Under its terms, the right of a biological mother to remain a parent is *never* open to question without access to a full panoply of due process protections, whereas a biological father may be deprived of parental rights without any determinations as to his fitness or otherwise.

Section 621 cannot survive scrutiny under the standard of *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978): "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." For, by depriving the father of his liberty interest without a hearing, § 621 cuts off at the threshold all inquiry as to whether that harsh result is realistically necessary to effectuate *any* important state interest.

## ARGUMENT

### I. Appellant's Demonstrated Parental Commitment to His Child Establishes a "Liberty" Interest Entitled to Constitutional Protections

In determining whether a person's rights to due process under the Fourteenth Amendment have been infringed upon, the first inquiry is whether the interest infringed upon is of the sort which is entitled to constitutional protection. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 (1977) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972) (emphasis in original)).

This Court has in four cases considered the extent to which a natural father's biological relationship with his child is entitled to protection under the Due Process Clause, even if the child is not the product of a marital union. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983). *Lehr* distilled the teachings of the earlier decisions to set forth the following test:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." *Id.*, at 389, n.7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the in-

dividuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972)). [463 U.S. at 261.]

The test is practical and rooted in the realities—the burdens and the joys—of the parent-child relationship.<sup>6</sup> The Court explained:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. [*Id.* at 262 (footnote omitted).]

In fact, the basic principle enunciated by the Court is that if an unwed father has demonstrated a full commitment to his paternity by accepting its burdens, has developed a relationship with his child, has cared for the child in the manner expected of a parent—by assuming financial, personal or custodial responsibilities—the Constitution recognizes that he has a "liberty" interest in his relationship to his child. *Lehr*, 463 U.S. at 260-262; *Caban*, 441 U.S. at 389 & n.7; *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. at 651-652.<sup>7</sup>

<sup>6</sup> The Court's thesis is reminiscent of Samuel Clemens' observation: "A baby is an inestimable blessing and bother." Letter to Annie Webster, September 1, 1876.

<sup>7</sup> See also *Rivera v. Minnich*, — U.S. —, — n.7, 107 S.Ct. 3001, 3004 n.7 (1987) (quoting *Lehr*, 463 U.S. at 261).

In this case there is a "developed parent-child relationship [as] was implicated in *Stanley* and *Caban*." See *Lehr*, 463 U.S. at 261.<sup>8</sup> Appellant Michael H. has amply demonstrated a full parental commitment to his child. Michael H. (a) filed a timely petition for declaration of paternity 18 months after the birth of the child, as soon as it became clear that the mother did not intend to acknowledge his paternity and might otherwise interfere with his relationship with Victoria; (b) was the *de facto* father of the child in a family unit during the periods Carole D. lived with him; (c) contributed financially to the child and mother on a regular and ongoing basis; (d) agreed to acknowledge the child as his sole heir; and (e) developed a warm and supportive parental relationship with his offspring both during the time he acted as *de facto* father and during his regular periods of visitation.<sup>9</sup>

The report of a court-appointed expert, moreover, demonstrates that Michael H. and his daughter had an actual relationship as warm, as tender, as supportive and as important to the child's development as any other parental relationship to which Victoria was exposed. Indeed, that report stressed the importance of extending

<sup>8</sup> In *Stanley* the Court stated: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S. at 651.

<sup>9</sup> This case, therefore, differs from the mere "potential relationship involved in *Quilloin*." See *Lehr*, 463 U.S. at 261. There, the natural father waited 11 years before filing a petition for legitimation, and "never exercised actual or legal custody over his child, and \* \* \* never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." 434 U.S. at 256. Appellant's situation is also unlike that in *Lehr*, where the natural father failed to establish "any significant custodial, personal, or financial relationship" with his child, 463 U.S. at 262, and the majority concluded that the State had "adequately protected his opportunity to form such a relationship." *Id.* at 263.

formal parental recognition to Michael H. because it was in the *child's* best interest to maintain her relationship with "the single adult \* \* \* most committed to caring for her needs on a long-term basis." J.S. B5; A. 51.

Accordingly, under this Court's precedents, Michael H. should be deemed to have a fundamental "liberty" interest entitling him to constitutional protection under the Due Process Clause of the Fourteenth Amendment.

## II. The California Statute Violates the Due Process Clause Because It Deprives Petitioner of His Liberty Interest Without a Hearing

A. Appellant Michael H. has been denied the opportunity to establish that he is the biological father of Victoria and to vindicate his liberty interest as a biological father who has "demonstrate[d] a full commitment to the responsibilities of parenthood," *Lehr, supra*, 463 U.S. at 621, by operation of § 621 of the California Evidence Code. In terms, § 621 declares that "the issue of a wife cohabiting with her husband \* \* \* is conclusively presumed to be a child of the marriage." In a case such as this, where a putative biological father, who is not the mother's husband, has established a parental relationship in the ways contemplated by *Stanley*, *Quilloin*, *Caban* and *Lehr*, the statute extinguishes that putative biological father's liberty interests, not on the merits after a full hearing and careful consideration of all the interests implicated, but by the legal fiction of conclusive presumption.

The foregoing presumption is, however, subject to certain exceptions. The first is that the conclusive presumption is not applicable where the husband is "impotent or sterile." *Id.* Additionally, pursuant to amendments adopted in 1980 and 1981,<sup>10</sup> the conclusive presumption is

<sup>10</sup> See *Estate of Cornelious*, 35 Cal.3d 461, 465, 198 Cal.Rptr. 543, 546, 674 P.2d 245, 248, appeal dismissed, 466 U.S. 967 (1984).

not applicable, and the husband's paternity may be challenged by blood-test evidence (§ 621(b)) in two circumstances—by the husband (§ 621(c)); and by the mother if the child's biological father has filed an affidavit with the court acknowledging paternity of the child (§ 621(d)).<sup>11</sup> Thus, the husband may raise the question of paternity alone, but neither the mother nor the biological father may do so except jointly.

By denying him a hearing to establish and effectuate his liberty interest in his relationship with his daughter, California has denied to appellant "due process of law—using that term in its primary sense of an opportunity to be heard and to defend [his] substantive right." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930) (Brandeis, J.). "Before a person is deprived of a interest, he must be afforded opportunity for some kind of a hearing \* \* \*," *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972), because "the right to be heard before being condemned to suffer grievous loss of any kind \* \* \* is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). In short, "[a] fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

One corollary of this constitutional principle is "that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In *Vlandis*, the Court declared unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a state statute mandating an

<sup>11</sup> Such a challenge would be brought on by notice of motion for blood tests which must, under both (c) and (d), be raised not later than two years after the child's birth.

irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. The Court said:

[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. [412 U.S. at 452.]

*Vlandis* followed, among other precedents (see 412 U.S. at 446-447), *Stanley v. Illinois*, *supra*. In *Stanley*, after holding that a man has a liberty interest "in the children he has sired and raised," 405 U.S. at 651, this Court went on to decide that Stanley had been deprived of that interest without due process of law by Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. Because of that presumption, the statute required the state, upon the death of the mother, to take custody of all children born of parents who were not married to each other, without providing any hearing on the father's parental fitness. The state sought to defend that presumption by the argument "that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children." *Id.* at 653. This Court disagreed:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would

have been furthered by leaving custody in him. [405 U.S. at 654-655 (footnote omitted).]

The irrebuttable presumption established by § 621 of the California Evidence Code—that a child born to a married woman who is cohabiting with her husband is the child of the husband unless the latter is impotent or sterile—is no more "necessarily or universally true" as a factual matter, *Vlandis*, 412 U.S. at 452, than the presumptions which were struck down in *Stanley* and *Vlandis*.<sup>12</sup> Nor, given the present day technology of blood tests, is the state without "reasonable alternative means," *id.*, for determining the identity of the actual father.<sup>13</sup> Like the presumption in *Stanley*, the effect of the California statute is to deny the biological father his liberty interest in "the companionship, care, custody, and management" of his child. *Stanley*, 405 U.S. at 651. Therefore, under this Court's precedents, it unconstitutionally deprives him of due process of law.

The conclusive presumption cases do not stand alone in requiring this conclusion. By refusing to provide the opportunity to establish legally the factual and emotional reality of parental interest,

<sup>12</sup> See also *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-646 (1974). In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court distinguished *Stanley* and *LaFleur* in sustaining the constitutionality of the nine-month-duration-of-relationship social security eligibility requirements for surviving wives and stepchildren of deceased wage earners. "Unlike the claims involved in *Stanley* and *LaFleur*," said the Court, "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Id.* at 771-772 (emphasis added).

<sup>13</sup> The situation was otherwise when California first codified the presumption in 1872 as a rule of expediency based, in part, on the impossibility of establishing an absolute determination of non-paternity when parentage was disputed. See Comment, "California's Conclusive Presumption of Legitimacy: *Jackson v. Jackson* and Evidence Code Section 621", 19 Hastings L.J. 963, 964 (1968).

the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. [citations omitted]. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. [*Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981).]

In *Lassiter*, a divided Court held that the Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The Court subsequently observed, however, that "it was 'not disputed [in *Lassiter*] that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.'" *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (quoting 452 U.S. at 37 (Blackmun, J., dissenting), and citing the Court's opinion in *Lassiter* and the dissenting opinion of Justice Stevens). As the Court added in *Santosky*:

The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). [455 U.S. at 753.]

B. The court below did not attempt to support the constitutionality of § 621 or its application against Michael H. on the basis that the presumption it establishes is a reasonable approximation of factual reality. Rather, the court below stated that the "conclusive presumption

is actually a substantive rule of law \* \* \*." J.S. B11 (citing *Kusior v. Silver*, 54 Cal.2d 603, 619, 7 Cal.Rptr. 129, 140, 354 P.2d 657, 668 (1960)).<sup>14</sup> This characterization is in accord with the current view of the California Supreme Court. See e.g., *Michelle W. v. Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748, 703 P.2d 88 (1985), appeal dismissed, 474 U.S. 1043 (1986).

Adhering to *Michelle W.*, the court below proceeded to determine whether Michael H.'s (and Victoria D.'s) due process claims were valid by purportedly balancing their interests against the state interests which § 621 is said to serve. In *Michelle W.*, the court had said:

We have held that the issue of whether section 621 adequately protects a putative father's interest "must be resolved by weighing the competing private and state interests." In *Board of Regents v. Roth* (1972) 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, the high court explained that "a weighing process has long been a part of any determination of the form of hearing required in particular situations.

<sup>14</sup> In *Kusior*, the Supreme Court of California rejected the contention that giving effect to the conclusive presumption of § 621 "is not consistent with constitutional principles in that there is no reasonable relationship between the presumption and the fact sought to be presumed in a case in which there is scientific evidence to the contrary." The court responded that

appellant does not suggest that the Legislature has no interest in or power to determine, as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child. There are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned. A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature. [54 Cal.2d at 618-619, 7 Cal. Rptr. at 139-140, 354 P.2d at 667-668.]

*Kusior*, which was decided long before *Stanley v. Illinois*, was a suit by the mother to establish paternity in a man other than the person who was her husband at the time of conception.

...” (Emphasis in original.) [39 Cal. 3d at 360, 216 Cal.Rptr. at 751, 703 P.2d at 91 (citation omitted).]

However, this Court’s decision in *Roth* does not justify the use of a balancing test in determining the constitutionality of § 621 here. For, regardless of the California courts’ characterization of § 621, the reality is that the court below *applied* the conclusive presumption precluding Michael from establishing that he is Victoria’s father “to terminate their relationship.” J.S. B14.<sup>15</sup> And where, as here, the issue is not the *form* of hearing but whether a person is entitled to be heard at all, a balancing test is not applicable; the only issue is whether or not a “liberty” or “property” interest is at stake. If so, *Roth* establishes (as we note at the outset of this part of our brief), that the Due Process Clause requires that a hearing be held.<sup>16</sup> This distinction was carefully articulated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982):

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party

<sup>15</sup> The court below acknowledged that in *Michelle W.* the California Supreme Court far from applying § 621 to *terminate* an existing father-child relationship “left open the validity of section 621 as applied to a situation where the state is preventing the *establishment* of a relationship between a putative father and child.” J.S. B14 (emphasis added).

<sup>16</sup> The sentence which the California Supreme Court quoted from *Roth* was the beginning of a comparison which reads in full as follows:

[A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the “weight” but to the *nature* of the interest at stake. See *Morrissey v. Brewer*, ante, p. 471, at 481. We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property. [408 U.S. at 570-571 (emphasis in original, footnote omitted).]

the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that “*some* form of hearing” is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571, n.8 (emphasis in original). And that is why the Court has stressed that, when a “statutory scheme makes liability an important factor in the State’s determination . . . , the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing.” *Bell v. Burson*, 402 U.S., at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See *id.*, at 542.

On the other hand, the Court has acknowledged that the timing and nature of the required hearing “will depend on appropriate accommodation of the competing interests involved.” [455 U.S. at 433-434 (footnotes omitted).]

Since it is established that Michael H. and other fathers similarly situated do have a liberty interest in their father-child relationship, their right to a hearing to vindicate that relationship cannot, consistently with the requirements of the Due Process Clause, be “balanced” away.

While stating that § 621 declares “a substantive rule of law,” the court below did not specify what it considered that rule of law to be. When that rule is articulated, however, the sweeping breadth of § 621 as construed herein is immediately evident. That rule, simply put, is that *unwed fathers shall not be recognized as such, and shall not enjoy any of the rights of parenthood if the mother is married and cohabiting with her husband, unless the husband is impotent or sterile, or either the husband or the mother (joined by the father) chooses otherwise.* As the court below understood § 621

and applied it in this case, that provision overrides the father's interest even if he "has established an affectionate relationship with [the child] and has at times even contributed to her support." J.S. B16. The rule cuts off such a father's liberty interest in his relationship with his child without a hearing into the circumstances of the individual case. It therefore violates the father's rights under the Due Process Clause even if it is regarded solely as a rule of substantive law.

It is illuminating in this regard to compare the situations in *Roth* and *Logan* with the operation of § 621. Whereas the right to a hearing asserted in the earlier cases was based on "property" claims which were dependent on state law,<sup>17</sup> appellant's liberty interest is derived directly from the Constitution itself. Thus, the state could have adopted legislation which eliminated the property right at issue in *Logan*—a claim under the state's Fair Employment Practices Act; it would thereby have eliminated any due process right to a hearing on a claim of employment discrimination. 455 U.S. at 432-433. But the state may not simply eradicate a father's liberty interest in his relationship with his daughter; it likewise may not accomplish the functional equivalent by denying him a hearing to vindicate that interest.

The state's interest in "the integrity of the family unit," J.S. B11, B15-B16, does not validate § 621. As we have shown above, the question whether a person has a right to *some* form of hearing to protect the liberty interest is not subject to any balancing test. Moreover, even if it is viewed as a substantive regulation, § 621

<sup>17</sup> See *Logan*, 455 U.S. at 430-431; *Roth*, 408 U.S. at 576-578. In *Roth*, the Court held that the respondent teacher did not have a property right in his continued employment, and therefore concluded that he was not entitled to a hearing concerning his dismissal. Cf. *Perry v. Sindermann*, 408 U.S. 593, 596-603 (1972). *Roth* also concluded that no liberty interest of the teacher was affected.

may not constitutionally be applied to override a liberty interest without a "showing [of] a subordinating interest which is compelling." Cf. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Carey v. Population Services International*, 431 U.S. 678, 685-686 (1977). Such a showing—indeed, even the minimal showing that the state interest in family stability would be furthered at all by depriving the father of any relationship with the child—depends on the existence of a stable family relationship between the mother and her husband. It is, to say the least, far from "necessarily or universally true in fact"<sup>18</sup> that the family relationship between a husband and his wife is stable where the mother has a child by another man, and that man, the father, has assumed and exercised responsibility for the care of the child and established a personal relationship with him or her. Therefore, the Constitution requires that the stability of the family be established in every case in which it is asserted as a reason for overriding the father's liberty interest.<sup>19</sup> So too, there must be a hearing to determine whether the liberty interest and the state interest can be accommodated, for example, by recognizing the true father's paternity and according him visitational rights. Nevertheless, as construed below, § 621 categorically overrides the father's liberty interest in his relationship with his child without regard to what a hearing would show as to whether the assertedly countervailing state interest is truly implicated, and if so, how that interest and that of the father can best be effectuated.

In disposing of appellant's interests, the court below observed: "Gerald D. and Carole D. are now living together with Victoria D. and their new baby boy as a

<sup>18</sup> *Vlandis v. Kline*, *supra*, 412 U.S. at 452.

<sup>19</sup> Of course, in those cases where the person who claims paternal rights has not established such a relationship with the child, he is without a constitutionally protected interest, and § 621 may have a constitutionally valid field of operation.

family unit. The state's interest in maintaining that family is considerable." J.S. B16. Since federal constitutional rights are involved, that analysis is utterly inadequate. To begin with, the court implicitly assumed that the present relationship there described is the pertinent one for evaluating Michael H.'s rights, and that this relationship is stable. Neither of these assumptions can survive constitutional scrutiny.<sup>20</sup>

Moreover, the court does not find that the state's interest in "maintaining that family" would be adversely affected if Michael H. were to be accorded the benefits of fatherhood, or inquire whether the state's asserted interests and those of the appellant can, in some way, be accommodated. The Due Process Clause does not permit a court to destroy the father's interest in his relationship with his child without making such a determination, and requires that no such determination be made except after a hearing directed to that issue.

The court below further stated that because Carole D. and Gerald D., who have custody of Victoria D., oppose Michael H.'s action, "there are competing *private* interests" as to parental relationships with the child. J.S. B16-B17 (emphasis added). But these "private interests" cannot, by their mere assertion, override the father's constitutional interest in his relationship with his daughter. This is so even though Carole D. also has a liberty

<sup>20</sup> Apparently because of the perceived requirements of § 621, the court ignored the abundant evidence—placed in the record before the trial court dismissed the case—which demonstrated the instability of the D.s' marriage. See Statement pp. 2-5, *supra*. Yet, the court below took note of and was influenced by the birth of a son to the D.s shortly before the hearing in that court, an event which was announced by the husband's attorney at oral argument.

We also submit that the Constitution does not permit a father in appellant's position to be divested of his interest in the child which he has fathered by the circumstance that the mother has produced another child with her husband while his parental rights are in litigation.

interest in *her* relationship with Victoria D. Due process requires that a resolution of these interests be made after a full hearing on all pertinent issues. See especially *Armstrong v. Manzo*, *supra*, where the father's due process right to a hearing was vindicated despite the opposition of the child's mother, his former wife. See 380 U.S. at 546-548.

A further state interest which the court below identified as justifying § 621 is that its "rule protects the innocent child from the social stigma of illegitimacy," J.S. B11, and the court invoked that theory in rejecting Victoria D.'s due process claim. *Id.* at B18. We anticipate that Victoria's constitutional position will be fully presented in the brief of her guardian *ad litem*; but we comment briefly on that portion of the court's decision because, although the court did not expressly advert to the "stigma" rationale in deciding against Michael H., it appears to have affected the result as to him as well. The court relied on the "stigma" theory in determining that the application of § 621 would be in Victoria D.'s welfare, *id.* at B17-B18, and the court's view as to what was in Victoria's welfare was a factor in its decision against Michael H. as well. *Id.* at B17.

We submit that the purported state interest in protecting Victoria D. against "social stigma" is not tenable even as a makeweight to override the interests of either appellant herein. To begin with, the Court of Appeal's rationale is contrary to the most recent apposite decision of the Supreme Court of California, which explicitly rejected an argument "that the 'stigma' of illegitimacy should be considered in determining the constitutionality of section 621." *Michelle W. v. Ronald W.*, 39 Cal.3d at 362 n.5, 216 Cal. Rptr. at 752 n.5, 703 P.2d at 92 n.5.

In any event, this rationale is wholly unsound. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), provides an apt analogy. There, the Court reversed a state court decision which had divested a natural mother of the custody of

her infant child because of her remarriage to a person of a different race. The state court had reasoned as follows:

*"This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come."* [466 U.S. at 431, this Court's emphasis.]

This Court forcefully rejected the notion that a child's welfare could be promoted by a court giving constitutional force and effect to private prejudices.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. \* \* \*

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. [466 U.S. at 433 (footnote omitted).]

The Court of Appeal's "social stigma" rationale in this case is likewise indefensible because it gives effect to the private prejudice against illegitimate children. Cf. *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Levy v. Louisiana*, 391 U.S. 68 (1968). The *Palmore* precedent aside, it is almost incredible that the court below should have given appreciable weight to the "stigmatization" concern in determining that Victoria D.'s interests would be furthered by depriving her of the affectionate relationship which she and her father have developed.

The court's determination concerning Victoria D.'s welfare—and the consequent rejection of the appellants' due process claims—is constitutionally insupportable for a more fundamental reason. That determination was the product of the presumption under § 621 rather than a hearing addressed to all the circumstances affecting Victoria's welfare. It is, therefore, constitutionally invalid under the authority of *Stanley v. Illinois*, *supra*. What the Court held in *Stanley* is equally apposite here:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care [or other issue pertinent to the child's welfare], when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [405 U.S. at 656-657.]

### III. The California Statute Violates the Equal Protection Clause Because It Invidiously Discriminates Against Biological Fathers

As the Court taught in *Stanley v. Illinois*, 405 U.S. at 651, "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)." Therefore, in determining whether § 621 of the California Evidence Code as construed and applied herein violates the Equal Protection command of the Fourteenth Amendment, the operative standard is that set forth in *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978): "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by suf-

ficiently important state interests and is closely tailored to effectuate only those interests."

Analysis of § 621 under this standard begins by identifying the classification it creates, and the fundamental rights with whose exercise it interferes: California Evidence Code § 621 treats fathers of children whose mother is married to and cohabiting with another man (if he is not sterile or impotent) differently from other parents. By operation of the statute, such a father is denied a hearing at which he is given the opportunity to prove that he is in fact the biological father of the child, and at which he may vindicate his parental rights in his relationship with the child, and is thereby deprived of his legal status as father and of all parental rights.

In denying the father of a child a hearing in which he can assert and vindicate his parental interests, although he has exercised his parental responsibility to that child, § 621 is, as we have discussed earlier, indistinguishable from the statute which was struck down in *Stanley v. Illinois*. In *Stanley*, after his children were made wards of the state upon their mother's death, the father was categorically denied a hearing on his fitness as a parent because, as an unwed father, he was conclusively presumed unfit under the Illinois statute. 405 U.S. at 649-650. This statutory conclusive presumption, operating to deny "a hearing to Stanley and others like him while granting it to other Illinois parents," was held to be "inescapably contrary to the Equal Protection Clause." *Id.* at 658. So too, § 621 denies appellant, Michael H., and other fathers similarly situated, a hearing in which they can establish their paternity and effectuate their parental rights.

Section 621 violates the Equal Protection Clause also because it constitutes gender-based discrimination like the statute which was struck down in *Caban v. Mohammed*. In *Caban*, § 111 of the New York Domestic

Relations Law required the consent of the mother to the adoption of a child born out of wedlock, but did not require the consent of the child's father. 441 U.S. at 385. The Court ruled that § 111 was an unconstitutional discrimination because it treated unwed fathers and unwed mothers differently—by allowing the mother an absolute veto over the adoption of their children and by not giving that same protection to fathers who "may have a relationship \* \* \* fully comparable to that of the mother." *Id.* at 389, 394. The effect of the statute was thus to discriminate unreasonably between the parents by making an undifferentiated distinction that bore no "substantial relationship to the State's asserted interests." *Id.*

In this case, just as in *Caban*, § 621 unjustifiably discriminates between biological parents. Under its terms, the right of a biological mother to remain a parent is *never* open to question without access to a full panoply of due process protections. On the other hand, a biological father is deprived of parental rights without any determination of his fitness and precluded from *ever* asserting his parental rights notwithstanding his established relationship with the child.

Section 621 cannot be sustained on the theory that it is supported by sufficiently important state interests and is narrowly tailored to serve only these interests. See *Zablocki, supra*. Indeed, with respect to the objectives asserted by the court below, it is significantly both over-inclusive and undersinclusive.

The state's interest in preserving the stability of the family will be served by § 621 only if the family relationship between the husband and wife and the mother's child is in fact stable, because § 621 precludes any hearing which challenges the husband's paternity and thereby cuts off at the threshold any inquiry into the stability of that family. Thus, § 621 can terminate a father's rights without advancing any state interest in family stability. With respect to the state's interest in the welfare of the child, § 621 is actually counterproductive because it forecloses a hearing at which the true welfare of the child

can be determined on the basis of all pertinent considerations—including, for example, whether the child's best interests would be "furthered by" preserving its relationship with its own father. Cf. *Stanley*, 405 U.S. at 654-655.<sup>21</sup>

Section 621 undermines the state's articulated goal in other circumstances as well. For example, if Carole D. had divorced Gerald D. after the child's birth, married Michael H. and raised the child with him, § 621 could prevent Michael H. from being adjudicated the child's father, even if he were the child's natural father as well as being the man in her family unit. Gerald would be considered the child's legal father and would be allowed to participate—in whatever fashion he might desire—in the Michael, Carole and Victoria family unit. That was the result in *Michelle W. v. Ronald W.*, *supra*.<sup>22</sup>

It is also apparent that § 621 is underinclusive by *permitting* the disruption of family stability. That provision authorizes the husband unilaterally, (or the mother, together with the unwed father), to raise the question of biological paternity. Such an action could be equally disruptive to family stability as an unwed father's individual request to be judicially declared a parent. So too,

<sup>21</sup> For the reasons stated earlier, we submit that protecting a child against the "social stigma" of illegitimacy is not a state interest which can be asserted to override parental rights. We note, however, that while § 621 is effective to prevent a child from learning the identity of her true father through the means of a paternity hearing, it denies parental rights to all fathers *even if the child already knows that the man to whom her mother is married is not her father*. That is likely to be the result in most, if not all, situations where the real father has developed a relationship with the child which is sufficiently close to be a liberty interest under *Lehr* and its antecedents. See Part I, *supra*.

<sup>22</sup> In that case, the biological father had not established a relationship with his child prior to the litigation. See p. 20, n.15, *supra*. Under the interpretation of § 621 by the court below, however, that would make no difference.

§ 621 specifically permits the natural father to bring into issue either the sterility or the impotence of the husband. The resulting disruption is surely no less than if he were to assert his paternity without impugning the husband's potential to sire a child. It is also clear that the statutory exceptions were framed without regard to the interests of the children who would inevitably be affected by the operation of § 621.<sup>23</sup>

Finally, the inclusions and exclusions on the face of § 621 take no account whatsoever of the fundamental difference between unwed fathers who have demonstrated a full commitment to the responsibilities of parenthood sufficient to vest them with a liberty interest, and other unwed fathers, who have developed no relationship with, and exercised no responsibility whatsoever for the child. Rather, it classifies fathers only according to whether the mother is or is not married and cohabiting with her husband. Thus, a father like Michael H. is deprived of all parental rights without any hearing, whereas nothing in § 621 prevents any man who has had a child with an unmarried woman from insisting on a hearing to establish his paternity and to assert his parental rights even if he has previously taken no interest in the child. A statute which so arbitrarily deprives fathers of their liberty interest "is inescapably contrary to the Equal Protection Clause." Cf. *Stanley*, 405 U.S. at 658.

<sup>23</sup> We note also, for whatever it may be worth, that each of the statutory exceptions disserves any interest which the state may assert in protecting the child against the "stigma" of its illegitimacy.

**CONCLUSION**

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

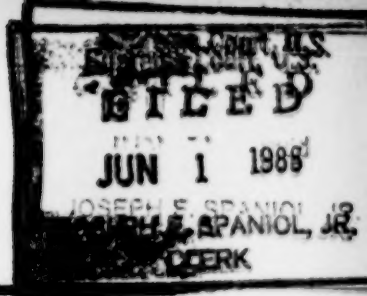
ROBERT A.W. BORAKS  
(Counsel of Record)  
BORAKS & LECKAR  
1818 N Street, N.W.  
Washington, D.C. 20036  
(202) 785-3240

GEORGE KAUFMANN  
RONALD K. HENRY  
PAUL R. TASKIER  
DICKSTEIN, SHAPIRO & MORIN  
2101 L Street, N.W.  
Washington, D.C. 20037  
(202) 785-9700  
*Attorneys for Appellant*  
*Michael H.*

*Of Counsel:*

JOEL S. AARONSON  
NEWMAN, AARONSON, KREKORIAN  
& VANAMAN  
14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

(8)  
No. 87-746



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

MICHAEL H. and VICTORIA D.  
*Appellants,*  
v.  
GERALD D.  
*Appellee.*

On Appeal From  
Court Of Appeal Of California  
Second Appellate District

**BRIEF FOR APPELLANT VICTORIA D.**

LESLIE ELLEN SHEAR\*  
SHEAR AND KUSHNER  
15915 Ventura Boulevard  
Penthouse Suite Four  
Encino, California 91436  
(818) 501-3691

*Attorney and Guardian ad Litem for  
Appellant Victoria D., A Minor.*

**QUESTIONS PRESENTED**

1. Whether a child's established relationship with her biological and psychological father is a fundamental liberty interest within the meaning of the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment to the United States Constitution?

2. Whether it is a deprivation of the child's rights under the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment for a State to create and apply by way of summary judgment a conclusive presumption that a child born to a married woman is the child of her husband, where that presumption operates to terminate the child's relationship with her biological and psychological father, without regard to the child's best interests?

3. Whether it is a deprivation of the child's rights under the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment for a State to deny a child continued visitation with her psychological and biological father?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW.....	1
CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED WITH CITATION TO STATUTORY PROVISION AND TO TIME FACTORS ON WHICH SUCH JURISDICTION RESTS .	1
TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE .....	9
SUMMARY OF ARGUMENT.....	13
ARGUMENT .....	14
I. VICTORIA HAS A FUNDAMENTAL LIBERTY INTEREST IN PRESERVING HER RELATIONSHIP WITH HER PSYCHOLOGICAL AND BIOLOGICAL FATHER	14
II. APPLICATION OF EVIDENCE CODE SECTION 621 DEPRIVED VICTORIA OF HER RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT .....	31
III. ADJUDICATION OF VICTORIA'S PATERNITY AND VISITATION CLAIMS BY CONCLUSIVE PRESUMPTION IN SUMMARY JUDGMENT PROCEEDINGS, WITHOUT PERMITTING VICTORIA TO COMPLETE HER DISCOVERY DEPRIVED HER OF PROCEDURAL DUE PROCESS .....	42
CONCLUSION.....	45

## TABLE OF AUTHORITIES

Cases	Page
<i>Belloti v. Baird</i> , 443 U.S. 622, 99 S.Ct. 3035 (1979)...	16, 17
<i>Caban v. Mohammed</i> , 441 U.S. 391, 99 S.Ct. 1760 (1979)	26
<i>Estate of Cornelious</i> , 35 Cal. 3d 461, 198 Cal. Rptr. 543 (1984).....	31, 36
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1011 (1970)...	42
<i>Gomez v. Perez</i> , 409 U.S. 535, 93 S.Ct. 872 (1973)...	24, 41
<i>Hess v. Whitsitt</i> , 257 Cal.App. 2d 552, 65 Cal. Rptr. 45 (1968) .....	34
<i>In re Lisa R.</i> , 13 Cal. 3d 636, 119 Cal. Rptr. 475 (1975).....	31, 37, 42
<i>Keaton v. Keaton</i> , 7 Cal. App. 3d 214, 86 Cal. Rptr. 562 (1970) .....	34
<i>Kusior v. Silver</i> , 54 Cal. 2d 603, 7 Cal. Rptr. 129 (1960).....	32, 33, 34
<i>Lehr v. Robertson</i> , 463 U.S. 254, 103 S.Ct. 2985 (1983).....	27, 28
<i>Marriage of Stephen B. and Sharyne B.</i> 124 Cal. App. 3d 524, 177 Cal. Rptr. 429 (1981).....	35, 36
<i>Michelle W. v. Ronald W.</i> , 39 Cal. 3d 354, 216 Cal. Rptr. 748 (1986).....	32, 39, 40, 42
<i>Palmer v. Sidoti</i> , 466 U.S. 429, 104 S.Ct. 1879 (1984)...	41
<i>Prince v. Commonwealth of Massachusetts</i> , 321 U.S. 158, 64 S. Ct. 438 (1944) .....	17
<i>Quilloin v. Walcott</i> , 434 U.S. 253, 98 S. Ct. 549 (1978)..	27
<i>Rivera v. Minnich</i> , — U.S. —, 107 S.Ct. 3001, 3004 (1987).....	14, 30, 33
<i>Santosky v. Kramer</i> , 455 U.S. 74, 102 S. Ct. 1388 (1982)	42
<i>SDW v. Holden</i> , 275 Cal. App. 3d 313, 80 Cal. Rptr. 269 (1969) .....	34
<i>Smith v. Association of Foster Families</i> 431 U.S. 816, 97 S. Ct. 2094 (1977).....	25
<i>Stanley v. Illinois</i> , 405 U.S. 645, 92 S.Ct. 1208 (1971).....	29, 30, 37, 44
<i>Vincent B. v. Joan R.</i> , 226 Cal. App. 2d 313, 179 Cal. Rptr. 9 (1981).....	38

## Table of Authorities Continued

Page

## STATUTES

- California Civil Code Section 4600. .... 3, 24  
 California Civil Code Section 4601. .... 5, 28, 38, 42, 43  
 California Civil Code Section 7002. .... 5, 25, 31  
 California Evidence Code Section 621. .... *passim*

## CONSTITUTIONS

- Fourteenth Amendment to the United States Constitu-  
 tion. .... *passim*

## LAW REVIEWS AND JOURNALS

- Bartlett, *Rethinking Parenthood as an Exclusive Status:  
 The Need for Legal Alternatives When the Premise of  
 the Nuclear Family Has Failed*, 70 Va. L. Rev. 879  
 (1984). .... 21, 25, 38  
 Glick, *Children of Divorced Parents in Demographic Per-  
 spective*, 35 J. Soc. Issue No. 4 (1979) ..... 20  
 Recent Developments, *California's Tangled Web: Blood  
 Tests and the Conclusive Presumption of Legitimacy*,  
 20 Stan. L. Rev. 754 (1968). .... 35

## BOOKS

- D. Davis, "The American Family and Boundaries in His-  
 torical Perspective" (Reiss and Hoffman, ed.) *The  
 American Family: Dying Or Developing?* (1979) .. 16  
 Eiduson, Kornfein, Zimmerman and Weisner, "Com-  
 parative Socialization Practices in Traditional and  
 Alternative Families" *Nontraditional Families: Par-  
 enting and Child Development* (M. Lamb, ed.) (1982)  
 ..... 20  
 C. Hoover, "Practical Considerations" (Reiss and  
 Hoffman, ed.) *The American Family: Dying Or  
 Developing?* (1979). .... 15  
 M. Lamb, "Introduction," *Nontraditional Families: Par-  
 enting and Child Development* (M. Lamb, ed.) (1982)  
 ..... 18, 19  
 A. McQueen, "The Adaptations of Urban Black Families:  
 Trends, Problems, and Issues" (Reiss and Hoffman,  
 ed.) *The American Family: Dying Or Developing?*  
 (1979) ..... 17

## Table of Authorities Continued

Page

- P. Moen, "The Two-Provider Family: Problems and Poten-  
 tials" (M. Lamb, ed.) *Nontraditional Families:  
 Parenting and Child Development* (1982) ..... 17  
 M. Sussman, "Actions and Services for the New Family,"  
 (Reiss and Hoffman, ed.) *The American Family:  
 Dying Or Developing?* (1979). .... 17, 20, 21  
 J. Viorst, "The High Cost of Separation", *Necessary  
 Losses* (1986). .... 22, 23

## GOVERNMENT PUBLICATIONS

- U.S. Bureau of the Census, Current Populations Reports,  
 Special Studies Series P-20, No. 312, *Marriage,  
 Divorce, Widowhood and Remarriage by Family  
 Characteristics: June 1975, (1977)* ..... 18  
 U.S. Bureau of the Census, Current Population Reports,  
 Series P-20, No. 411, *Household and Family Charac-  
 teristics: March 1985* (1986) ..... 19  
 U.S. Bureau of the Census, Current Population Reports,  
 Series P-23, No. 150, *Population Profile of the United  
 States: 1984-1985* (1987) ..... 19

**CITATIONS TO THE OPINIONS AND JUDGMENTS  
DELIVERED IN THE COURTS BELOW**

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is reported at 191 Cal.App.3d 995 (1987). It is reprinted in the Appendix to the Jurisdictional Statement.

Denial of Appellants' Petitions for Review by the California Supreme Court is reported at 23 California Official Reports "Minutes of Supreme Court" 9 (1987).

**CONCISE STATEMENT OF GROUNDS ON WHICH THE  
JURISDICTION OF THIS COURT IS INVOKED WITH  
CITATION TO STATUTORY PROVISION AND TO TIME  
FACTORS ON WHICH SUCH JURISDICTION RESTS**

The judgment of the Supreme Court of California, denying appellants' petitions for review, was filed on July 30, 1987.

A notice of appeal to this Court was duly filed in the Court of Appeal, 2d District, Division Three, of California on October 28, 1987.

This appeal was docketed in this Court within 90 days from the judgment below. Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The provisions of 28 U.S.C. section 2403(b) may be applicable.

This Court noted probable jurisdiction on February 29, 1988. Pursuant to the motion of appellants, leave for an extension of time to file briefs on the merits was granted to and including May 5, 1988.

**TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES**

**Fourteenth Amendment, United States Constitution**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**California Evidence Code Section 620**

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

**California Evidence Code Section 621**

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

**California Civil Code Section 4600**

(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider

and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child pursuant to Section 4608:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the non-custodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the

pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

#### **California Civil Code Section 4601**

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

#### **California Civil Code Section 7001**

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

#### **California Civil Code Section 7002**

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

#### **California Civil Code Section 7003**

The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

**California Civil Code Section 7004**

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following [1] paragraphs:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(5) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure.

This paragraph shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

**California Civil Code Section 7006**

(a) A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed after paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or parent of the alleged father if the alleged father has died or is a minor. Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017 if a proceeding has been filed under Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for,

consents to, or proposes to relinquish for or consents to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of the child or the birth of the child, whichever is later. The commencement of the action shall suspend any pending proceeding in connection with the adoption of the child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also, at his or her discretion, bring an action under this section in any case in which the district attorney believes it to be appropriate.

#### California Civil Code Section 7008

The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If he is a minor and a party to the action he shall be represented by a guardian ad litem appointed by the court. The natural mother, each man presumed to be the father under Section 7004, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in subdivision (f) of Section 7017 and an opportunity to be heard. The court may align the parties.

#### STATEMENT OF THE CASE

Carole S. and Gerald D. were married on May 9, 1976. (R 21). In the three years prior to the family evaluation, conducted between June and September of 1984, Carole

and Gerald had resided together for a total of seven months, and never longer than three months at a time. (R 215)

During the summer of 1978, Michael H. and Carole commenced an intimate relationship which continued through mid-September, 1980. (R 25) Victoria D. was born to Carole on May 11, 1981. (R 26) At the time of Victoria's birth, Carole and Victoria resided with Gerald (R 22-23). When Victoria was five months old, Gerald moved to New York, leaving Carole and Victoria in California. (R 23) In that month, Carole and Michael voluntarily participated with Victoria in paternity testing (Human Leucocyte Antigen tissue typing) at the University of California at Los Angeles. That test established a 98.07 percent probability that Michael is the father of Victoria. (R 30).

Carole, Victoria, and Carole's mother resided with Michael for approximately three months in early 1985 at Michael's home in the Virgin Islands. Carole and Victoria then spent two months with Gerald in New York. Carole and Victoria resided together for the next two months in Los Angeles. From May, 1982 until March, 1983, Carole and Victoria resided with another of Carole's male companions, Scott. (R 214). Michael served Carole with his Petition to Establish a Parent and Child Relationship in November, 1982. (R 214)

In March of 1983 the Court determined that Victoria required independent counsel, and appointed an attorney and guardian ad litem on her behalf. (A 1-6). Victoria filed a cross-complaint which contained the following language, "Both [Michael] and [Gerald] have claimed that each of them has formed a psychological or *de facto* father-child relationship with Victoria. If Victoria has one or

more psychological or *de facto* father(s) she is entitled to care, supervision, support and rights of inheritance from said father or father(s)." The cross complaint sought:

- "1. A Declaration of Rights establishing whether there exists a parent-child relationship between [Michael] and Victoria;
2. A Declaration of Rights establishing whether there exists a parent-child relationship between [Gerald] and Victoria;
3. Orders allocating responsibility for her care, supervision, (custody and visitation) and support;
4. Attorneys fees and costs for this proceeding;
5. Such other and further relief as the Court deems proper.

Carole, Michael and Victoria resumed living together as a family in August, 1983. (R 74, 85) During the period in which they resided together, Carole signed a stipulation acknowledging Michael's paternity, granting him visitation rights and acknowledging Gerald's status as a stepparent. (R 87) Before that stipulation could be signed by all parties and counsel, Carole instructed her attorney that she had changed her mind. The parties separated at the end of April, 1984, and Carole denied visitation between Victoria and Michael. (R 74-77, 85-86).

On May 10, 1984, the Court granted Carole's ex parte request for temporary restraining orders, and granted Michael's exparte request for visitation with Victoria pending a June 12 hearing on the requests of each of them for temporary orders. Carole, Michael, and Victoria's guardian ad litem stipulated to appointment of an expert to "serve the dual functions of assisting the guardian ad

litem in determining the child's best interests, and providing evidence in this matter." (A 11-13)

Pursuant to that stipulation, the parties met with Dr. Norman Stone several days before the June 12 hearing, for a preliminary evaluation. The Court adopted the recommendations of the expert, and awarded visitation rights to Michael. (A 35-40).

The order permitted Carole remove Victoria from Los Angeles, provided that she did not deprive Michael and Victoria of more than one visit with one another. That same month Carole took Victoria to New York.

Carole's failure to return Victoria to Los Angeles for visitation with Michael resulted in Carole's conviction of six counts of contempt of court. She was sentenced to serve five days in the county jail for each count of contempt. Upon the return of Victoria to the jurisdiction the sentence was suspended, and Carole was freed on probation. (A 29-34)

Almost immediately thereafter, Gerald filed his answers to the complaint and cross-complaint.

Following completion of Dr. Stone's evaluation, the matter came on again for hearing in October, 1984. Dr. Stone submitted a highly detailed and carefully reasoned family evaluation report (R 212-231), analyzing three potential family structures: Carole as primary caretaker, Michael as primary caretaker, and Carole and Michael sharing caretaking responsibilities. Sadly, he concluded that each alternative "would predispose Victoria to future emotional and social problems." (R 216)

Dr. Stone found that Victoria was attached "principally and equally" to Michael and Carole. (R 216) He concluded that "it is important for Victoria that [Michael] be permit-

ted to remain a member of her family . . . because we perceive Michael as the single adult in Victoria's life most committed to caring for her needs on a long term basis." Dr. Stone recommended a program of visitation for the period October, 1988 through June, 1987 to be followed by a re-evaluation. On October 23, 1984, the parties entered into a stipulation incorporating Dr. Stone's recommendations.

Victoria and Michael enjoyed monthly visits under the order until the Court granted Gerald's motion for summary judgment on January 28, 1985, terminating the previously ordered visitation. Victoria's motion to compel discovery, set for the same day, was denied. (A 53-58, 61-62).

Visitation pending appeal has been denied because "The Court believes that the existence of two (2) "fathers" as male authority figures will confuse the child and be counter-productive for her best interests." (A 82-92)

#### SUMMARY OF ARGUMENT

California's conclusive presumption that a woman's husband is the father of her child, when applied to an established psychological parent and child relationship between a child and her biological father deprives the child of her rights to equal protection and due process of the law. Such a relationship between father and child is a fundamental one, protected by the 14th Amendment of the United States Constitution. A child's need for continuity in her parental relationships<sup>1</sup>, particularly those

<sup>1</sup> Societal awareness of the numbers of children who experience variant family forms is illustrated by the cartoon in which, upon receiving his report card, a child asks his teacher, "Which parent do you want to sign it: my natural father, my stepfather, my mother's third husband, my real mother or my natural father's fourth wife who lives with us?" Unger, *Herman*, Universal Press Syndicate (1983)

formed in early childhood, outweighs the state's interests in preserving the apparent integrity of the matrimonial family or protecting the child from any stigma flowing from her mother's marital status at the time of her conception.

Where a state has adopted the Uniform Parentage Act, rendering parental marital status irrelevant to the issue of the existence of the parent and child relationship, it may not exclude children born to married women from the Act. Similarly, when a state proclaims a public policy assuring children of frequent and continuing contact with both parents following separation, a state may not deprive a child of the benefits of that policy by declaring her biological and psychological father to be a stranger, and conferring paternity on her mother's husband.

Termination of an existing psychological relationship between a child and her biological father by summary judgment proceedings, prior to the completion of discovery, coupled with application of the conclusive presumption of paternity, deprives the child of procedural due process.

#### ARGUMENT

##### I. VICTORIA HAS A FUNDAMENTAL LIBERTY INTEREST IN PRESERVING HER RELATIONSHIP WITH HER PSYCHOLOGICAL AND BIOLOGICAL FATHER

A child's interest in preserving her relationship with a psychological and biological parent is a fundamental liberty interest within the meaning of the Fourteenth Amendment to the United States Constitution.<sup>2</sup> The

<sup>2</sup> At issue is Victoria's right to receive from Michael "the training, nurture and loving protection that are at the heart of the parental relationship protected by the Constitution." *Riviera v. Minnich*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 3001, 3004 (1987).

right to preserve parent and child relationships is second only to the right to liberty in its impact on the lives of parent and child.

California's conclusive presumption that, except under certain defined circumstances, a married woman's husband is the father of her child acts to protect a limited number of marital relationships at the expense of children's actual relationships. In this case California has sacrificed Victoria's biological and psychological relationship with Michael to protect the apparent<sup>3</sup> integrity of the marriage between Carole and Gerald. In so doing, it rejected a functional analysis of the family and adopted a romanticized<sup>4</sup> but unrealistic view of the family.

This Court has recognized that the constitutional rights of children need to be assessed and applied with particular sensitivity and flexibility:

A child, merely on account of his minority, is not beyond the protection of the Constitution . . . . The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore v. East Cleveland*, 431 U.S. 494, 503-504 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their

<sup>3</sup> Had the parties actually practiced marital fidelity, this circumstance would not have arisen.

<sup>4</sup> " . . . [E]very parental generation has some belief in a golden age of family stability." C. Hoover, "Practical Considerations" in Reiss and Hoffman, *The American Family: Dying or Developing?*, (1979) at 37.

inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

*Belloti v. Baird*, 443 U.S. 622, 633-634, 99 S.Ct. 3035, 3043 (1979).

The child-parent relationship is fundamental because the nature of child-rearing in one generation significantly shapes the nature of the society in the next.<sup>5</sup> Thus family and society bear a reciprocal relationship to one another. While scientists may work forever to ascertain the ratio in which nurture versus nature determines individual characteristics, no one in modern society denies the significant role played by nurture. Thus one of the most significant ways in which citizens in pluralistic society may exercise their freedom and contribute to the society's development is child-rearing.<sup>6</sup> One's personality, values

<sup>5</sup> [T]he family—as we recognize it today—is not a self-enclosed entity. It is a personification of the strong and often practical requirements of a complex society. It also serves to express the very human and ethical aspirations of its members. The family as an agent of practical society falls victim to political and economic forces, but as the agent of the best human hopes, it is our agent for changing social form and custom. Reiss and Hoffman, *The American Family: Dying or Developing?* 4 (1979)

<sup>6</sup> "Tocqueville . . . sensed that the family somehow exemplifies the restructuring and redefinition of boundaries in a democratic society. His major concern, it should be stressed, was how the irresistible movement toward equality could be "civilized," so to speak, by a voluntary acceptance of various restraints and limits. And such voluntary acceptance, in Tocqueville's view, depended on the nature and the future of the family.

"Tocqueville's great insight, which was in no way diminished by his bias or his factual error, is that the historical drift toward equality impinges on boundaries of every kind: psychological, social, political, religious, and territorial. Not only is the family itself shaped by the trend toward equality of condition, but it is at once a key source, amplifier, and stabilizer of equalitarian aspirations, of individualism, and of the restless pursuit of success.

D. Davis, "The American Family and Boundaries in Historical

and capacity to contribute to the community are substantially influenced by the character of one's childhood family experiences. Both individuals and society have a vital interest in protecting children's family relationships. Those interests diverge only when state intervention is essential to protect the child from harm. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944). Governmental preference for a particular family form may also, indirectly, reflect ethnocentricity and class bias.<sup>7</sup>

We have believed in this country that this process [childrearing], in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.

*Belloti v. Baird*, *supra.*, 433 U.S. at 638, 99 S.Ct. at 3045.

Families are multidimensional—depending upon one's focus the family is a natural (biological), psychological, social, religious, or economic entity. Families are also dynamic.<sup>8</sup> Family composition frequently changes<sup>9</sup> dur-

Perspective" in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra.* at 20.

<sup>7</sup> See A. McQueen, "The Adaptations of Urban Black Families: Trends, Problems, and Issues" in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra.* at 79.

<sup>8</sup> "Families are dynamic institutions with continuously changing membership, functions, and needs over time."

P. Moen, "The Two-Provider Family: Problems and Potentials" in *Nontraditional Families: Parenting and Child Development* 13, 33 (M. Lamb, ed. 1982).

<sup>9</sup> "individuals move continuously in and out of these family forms. M. Sussman, "Actions and Services for the New Family," in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra.* at 219.

ing the years of childhood. A child may spend portions of his or her childhood in a marital or nonmarital nuclear family, a single-parent family, a blended (step-parent) family<sup>10</sup>, an extended family, one or more foster families, and an adoptive family. Moreover the substantial percentage of children at any given time who do not live in a single household with their two biological parents, may in fact be members of two households under a joint custody or visitation plan, or may enjoy stepparent visitation with a parent's ex-spouse. By definition, those children and parents who come before courts for the adjudication of parental rights and responsibilities represent the substantial portion of Americans whose family structure does not conform to the nuclear family model. Rather than trying to force such families into stereotypical roles, the State should support the functioning parent and child relationships which have developed.

The "traditional" family, comprised of a married couple and their biological children is no longer, and may never have been the dominant family form.<sup>11</sup> Seven years ago,

<sup>10</sup> Census figures show that approximately 80 percent of divorced persons remarry. U.S. Bureau of the Census, Current Population Reports, Special Studies Series P-20, No. 312, *Marriage, Divorce, Widowhood and Remarriage by Family Characteristics: June 1975*, (1977) at 8-10.

<sup>11</sup> "Social scientists have speculated about and researched parental and family influences on child development for many decades. As sociopolitical philosophies have changed with time, so too have the assumptions and recommendations of social scientists. One assumption has remained consistent, however: the notion that the "ideal family" contains a primary caretaking and housekeeping mother, and a breadwinning father. Consequently, analyses of the family have consistently portrayed this traditional constellation as the most appropriate context in which to raise children. As a result, any and every deviation from "the norm" is usually considered briefly and disparagingly.

"Even today, the traditional family is frequently recalled roman-

almost one third of all children did not live in a nuclear family unit (mother, father and their biological children).<sup>12</sup> The trend away from the traditional family is

---

tically and nostalgically by those who bemoan its demise. Demographers, however, doubt that traditional families were ever as common as these Cassandras imply and social scientists question whether the decline of the nuclear family can legitimately be viewed as the cause of the contemporary social malaise. Certainly the traditional family is far from being today's norm, but unfortunately, little reliable evidence regarding the effects of 'deviant' family styles was available until recently."

M. Lamb, Preface, in *Nontraditional Families: Parenting and Child Development* ix. (M. Lamb, ed. 1982).

<sup>12</sup> About 68 percent of children lived with both *biological* parents in 1981 (based upon the National Health Interview Survey), 7 percent with their biological mother and stepfather, and 2 percent with their biological father and stepmother. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 150, *Population Profile of the United States: 1984-1985* (1987) 23 n.7. Presumably the remaining 23 percent resided in foster care, adoptive homes, with relatives, or with unrelated families (persons in institutional care were excluded from the survey).

It is more difficult to conclude from population studies what percentage of children will live with both biological parents for their entire childhoods. Each year five out of every one thousand marriages end in divorce. *Id.* at 22 "One of the most significant changes in family composition over the past 15 years has been the substantial growth in the number of one-parent situations. Single parents accounted for 26 per cent of all family groups with children under 18 years old in 1985, a proportion twice as large as in 1970 . . . The proportion of single parents who are mothers who have never been married has increased dramatically from about 7 percent in 1970 to 25 percent in 1985 . . . Divorced mothers constituted about 37 percent of the persons maintaining one parent groups, significantly higher than their 29-percent share in 1970 . . . Fathers maintained about 12 percent of the one-parent groups in 1985." U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 411, *Household and Family Characteristics: March 1985* (1986) 9-10.

It is reasonable to assume that when Michael came to Victoria's nursery school to exercise visitation, no one found the situation particularly remarkable. A substantial number of Victoria's class-

expected to continue.<sup>13</sup> One expert predicts that forty percent of all children will live in variant family forms by 1990.<sup>14</sup> Given the phenomenon of family pluralism, insistence on a particular family form may be destructive rather than constructive.<sup>15</sup>

mates are likely to live in single parent households or stepfamilies and to maintain visitation arrangements with other parental figures.

<sup>13</sup> "Some of the compelling modifications of family in America initiated during the 1970s have been projected as continuing into the 1980s (Masnick & Bane, 1980). It is anticipated that one-third of all children born during the '70s will be spending part of their childhood living with a single parent. Only one-quarter of all American households will be conventional ones, if "conventional" is defined as including mother, father, and children. Thirteen separate types of households will eclipse in numbers the conventional units. Most of our understanding of the ways children in families are socialized is derived from studies of conventional two-parent nuclear units. However, because Bureau of Census data are "eliminating the typical family," as reported in one announcement (Peirce, 1980), normative data on values and practices relevant to child development in family variants are essential in order to assess the implications for the child who grows up in a variant family form."

Eiduson, Kornfein, Zimmerman and Weisner, *Comparative Socialization Practices in Traditional and Alternative Families in Nontraditional Families: Parenting and Child Development* 315, 336 (M. Lamb, ed. 1982).

<sup>14</sup> Gluck, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. Issue No. 4, at 170, 171, Table 1 (1979).

<sup>15</sup> "... [P]luralism in family structures reflects variations in the racial, ethnic, religious, and age groups that compose the American salad-bowl culture. Each of these forms, because they are so different from one another, has varied problems to solve and issues to consider when dealing with organizations and institutions and its own internal family relationships. Most important, variant family forms have different needs from the traditional nuclear family for outside services and supports, which for the most part remain unmet in the United States today.

"Until recently, we have used an idealized family form—the single-breadwinner, intact family—on which to base our public policies and programs, ignoring or deprecating other family forms which differ

Yet children require preservation and protection of their parental relationships which withstands changes in the family's form.<sup>16</sup> When the state engages in the legal fiction that the mother's husband is the child's father, it offers no guarantees that the mother's husband will remain a permanent fixture in the child's life. The record here reflects substantial periods in Victoria's early years in which Gerald took no action to ensure the continuity of her relationship with him. By contrast, Michael has engaged in a continuous effort to establish and protect his relationship with Victoria. The Court's expert found him to be the single adult in Victoria's life most committed to caring for her needs on a long term basis. (Jur. St., at 13).

What is important for children is that the persons with whom they establish the psychological parent-child relationship, remain active participants in their rearing. Preservation of the illusion of a nuclear family is less beneficial than preservation of children's actual attachments.

from this "ideal" type." M. Sussman, "Actions and Services for the New Family," in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra.* at 227. Sussman points out that governmental policies based upon the idealized family form may actually destroy functioning family systems.

<sup>16</sup> "Vigorous debate rages over how a child develops, what is in a child's best interests, and how to achieve certain objectives on behalf of a child. Near consensus does exist, however, for the principle that a child's health growth depends in large part upon the continuity of his personal relationships. When divorce, death of a parent, foster care, or adoption intrude on a child's family life, such continuity is inevitably interrupted. Although some children may not experience lasting emotional or social harm from these crises, and some children may even benefit from them eventually, it seems reasonable to adopt as an operating principle the notion that a break in family continuity is detrimental to a child." Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 902.

Loss of a parent with whom a child has formed a significant attachment<sup>17</sup> has serious long-term developmental consequences.<sup>18</sup> While the state cannot guarantee that

<sup>17</sup> Here the Court's expert found that Victoria's attachment to Michael was as strong as her attachment to her mother. (Joint Appendix 212-231).

<sup>18</sup> "... [A] reliable early attachment is vitally important to healthy development, the cost of breaking that crucial bond—the cost of separation—may be high . . . . [W]hen separation imperils that early attachment, it is difficult to build confidence, to build trust, to acquire the conviction that through the course of our life we will—and deserve to—find others to meet our needs. And when our first connections are unreliable or broken or impaired, we may transfer that experience, and our responses to that experience, onto what we expect from our children, our friends, our marriage partner, even our business partner.

"Expecting to be abandoned, we hang on for dearest life: 'Don't leave me. Without you I'm nothing. Without you I'll die.'

"Expecting to be betrayed, we seize on every flaw and lapse: 'You see—I might have known I couldn't trust you.'

"Expecting to be refused, we make excessive aggressive demands, furious in advance that they will not be met.

"Fearful of separation, we establish what Bowlby calls anxious and angry attachments. And frequently we bring about what we fear. Driving away those we love by our clinging dependency. Driving away those we love by our needy rage. Fearful of separation, we repeat without remembering our history, imposing upon new sets, new actors and a new production our unrecalled but still so-potent past.

"For no one is suggesting that we consciously remember experiences of early childhood loss . . . What stays with us instead is what it surely must have felt like to be powerless and needy and alone. Forty years later, a door slams shut, and a woman is swept with waves of primitive terror. That anxiety is her "memory" or loss.

"Loss gives rise to anxiety when the loss is either impending or thought to be temporary. Anxiety contains a kernel of hope. But when loss appears to be permanent, anxiety—protest—gives way to depression—despair—and we may not only feel lonely and sad but responsible ("I drove her away") and helpless ("I can do nothing to bring her back") and unlovable ("The is something about me that

parents will be motivated to continue their parental relationships through the family's shifting forms, it should not preclude the preservation of those actual relationships in favor of a formal classification which is of secondary importance to children.

The California Legislature has recognized the importance of continuity of parental relationships. Civil Code

makes me unworthy of love") and hopeless ("Therefore I'll feel this way forever!").

"Studies show that early childhood losses make us sensitive to losses we encounter later on. And so, in mid-life, our response to a death in the family, a divorce, the loss of a job, may be a severe depression—the response of that helpless and hopeless, and angry child.

"Anxiety is painful. Depression is painful. Perhaps it is safer not to experience loss. And while we may indeed be powerless to prevent a death or divorce—or our mother from leaving us—we can develop strategies that defend us against the pain of separation.

"Emotional detachment is one such defense. We cannot lose someone we care for if we don't care. The child who wants his mother and whose mother, again and again and again, isn't there, may learn that loving and needing hurt too much. And he may, in his future relationships, ask and give little, invest almost nothing at all, and become detached—like a rock—because 'a rock, 'as a sixties song tells us, 'feels no pain. And an island never cries.'

"Another defense against loss may be a compulsive need to take care of other people. Instead of aching, we help those who ache. And through our kind ministrations, we both alleviate our old, old sense of helplessness and identify with those we care for so well.

"A third defense is a premature autonomy. We claim our independence far too soon. We learn at an early age not to let our survival depend upon the help or love of anyone. We dress the helpless child in the brittle armor of the self-reliant adult.

"The losses we have been looking at—these premature separations of early childhood—may skew our expectations and or responses, may skew our subsequent dealings with the necessary losses of our life . . . Loss can dwell within all of our life.

J. Viorst, "The High Cost of Separation", *Necessary Losses* (1986).

Section 4600 begins by declaring: "The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of childrearing in order to effect this policy." This policy is phrased in terms of the child's rights, not those of the parents. By the simple but cruel expedient of defining Michael as a stranger rather than a parent, the state has deprived Victoria of the protections it affords to other children. California's statutory scheme required Carole's marital status at the time of conception to be the sole determinant of Victoria's paternity, absent Gerald's formal rejection of the role, or concerted effort by Carole and Michael to establish Michael's paternity. This Court has held that

... a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally . . . there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust." (Citation omitted.)"

*Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875 (1973). By denying her right to frequent and continuing contact with Michael, California has violated Victoria's due process and equal protection rights.

This Court, in a variety of contexts, has been called upon to explore which family relationships between parental figures and children are entitled to constitutional protection, and the nature and extent of that protection. The cases themselves reflect the variety of family relationships which children experience and the tensions which arise from an effort to make decisions which will shape children's lives, based upon the facts as they exist at

a particular moment in time and based upon a concept of parenthood as an exclusive status.

[T]he child's need for continuity in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or (set of parents) . . . . Current research demonstrates that even if nuclear families are best for children, when children form parental relationships outside of the nuclear family they often lose more from the law's enforcement of exclusive parental relationships than they gain.

Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 882.

Victoria and Michael's psychological and biological father-daughter relationship is entitled to substantive and procedural due process protection. In *Smith v. Association of Foster Families*, the Court recognized that fundamental liberty (431 U.S. 816, 97 S.Ct. 2094 (1977)) interests arise between a psychological parent and child, but found that in the case of foster families, such interests are secondary to those of the natural family. Victoria's relationship with Michael is founded upon both psychological and biological bonds. California has erroneously concluded that such interests must be secondary to those of the marital family.

Stepparent adoptions provide the closest analogy to the facts of this case.<sup>19</sup> Cases involving stepparent adoptions

<sup>19</sup> As a presumed father under Civil Code Section 7000 et. seq. Michael's consent or an action to declare Victoria free from his custody and control would have been necessary prior to a stepparent adoption. Under California Civil Code Section 232 Michael's parental rights could have been terminated only upon proof of abandonment, failure to support or communicate, cruelty or neglect, alcohol or

have led to varying analyses. The Court has found that gender-based discrimination invalidated a statutory scheme prohibiting the natural father from a right to veto a stepparent adoption while granting that right to natural mothers. (Unlike the statute reviewed here, the natural father's rights could be terminated under the invalid statutory scheme only where such termination was found to be in the child's best interests.) *Caban v. Mohammed*, 441 U.S. 391, 99 S.Ct. 1760 (1979).<sup>20</sup>

---

drug-related disability or moral depravity, felony conviction, developmental or mental disability or mental illness, failure to maintain adequate parental relationship, or child abuse.

Although it made no pragmatic difference in Victoria's life or in her actual relationship with Michael, Carole's marital status at the time of Victoria's conception shifted the standard of proof necessary to terminate the relationship between Victoria and Michael from clear and convincing evidence of one of the circumstances set forth above to a conclusive presumption that no relationship may exist.

<sup>20</sup> One year earlier, the constitutional challenge of a father who had enjoyed visitation with his son was rejected, in favor of a stepparent adoption which gave "full recognition to a family unit already in existence, a result desired by all involved except appellant." (Interestingly, the opinion noted that like many children so situated, the 11-year-old boy in this case wanted to continue visits with his biological father, while simultaneously establishing a legal relationship with his stepfather. The stepparent adoption cut off the child's right to continued visits with his biological father, while not having a substantial impact on his daily life in the new family unit.)

The Court's effort to distinguish the father's position from that of a divorced father who had exercised visitation is unpersuasive. Rather than identifying the factors which distinguish the two situations, the Court stressed that the father did not seek custody of the child and therefore had not exercised substantial parental responsibility. The logical societal consequence of such reasoning would be an increase in biological fathers seeking custody of children regardless of their best interests out of fear that otherwise their relationships might be abruptly terminated once a stepfather entered the picture. Moreover, the dividing line between custody and visitation has become less distinct over time with the growing acceptance of joint custody

In *Lehr v. Robertson*, 463 U.S. 254, 258, 103 S.Ct. 2985, 2991 (1983), while upholding a stepparent adoption over the natural father's objections, the Court explored the significance of varying aspects of the father—child relationship, recognizing at one point that "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." The Court saw paternal biological ties as the source of opportunities rather than rights.<sup>21</sup> While a biological mother could leave the children in the care of others without surrender of her rights, actual assumption of the role of fatherhood was treated as a necessary prerequisite of constitutional protection. The Court viewed rights to seek protection of the father-child relationship as emerging only when a biological father also assumed parental responsibility, ignoring the fact that the father and child's opportunities to form a relationship might be effectively impeded or barred by the mother. Under the reasoning of *Lehr*, Victoria's relationship with Michael is entitled to

---

arrangements, and replacement of the old language of custody and visitation with "parenting plans" which allocate responsibility for the child's daily care and supervision. (See, for example, California Civil Code 4600.5) *Quilloin v. Walcott*, 434 U.S. 253, 98 S.Ct. 549 (1978). The Court's insistence upon viewing families as units rather than dynamic entities comprised of changing relationships led to this unfortunate result.

<sup>21</sup> "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (*Lehr, supra*, 463 U.S. 262, 103 S.Ct. 2993-2994).

protection, as Michael has assumed all of the responsibilities of fatherhood with respect to Victoria, whenever it has been in his power to do so.

California's statutory scheme denies that choice to natural fathers, where the mother is married and cohabiting with her husband at the time of conception (unless, within two years after birth, the mother joins with the natural father in seeking blood tests to establish his paternity). Here, until protected by the Court's pendente lite visitation orders under Civil Code Section 4601, Victoria and Michael's opportunities to enjoy their relationship with one another were entirely dependant upon the vagaries of Carole. When Carole's romance with Michael flourished, Michael was "Daddy" to Victoria. When Carole enjoyed conjugal harmony with Gerald, he acted as Victoria's "Poppa."

In the few years encompassing her early childhood, Victoria's family structure altered frequently. Although the Court had previously found preservation of her relationship with Michael to be in Victoria's best interests, Evidence Code Section 621 deprived the Court of discretion to consider the child's best interests. By granting Gerald's motion for summary judgment, and denying Victoria's request for visitation under Civil Code Section 4601, the state brutally removed Michael from Victoria's daily life.

"[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Lehr, supra*. 463 U.S. 266-267, 103 S.Ct. 2997. Victoria contends that a statutory scheme which ignores her attachments and her best interests is constitutionally defective. To the extent that the rights of

a biological father and child are conditioned upon the formation of an attachment between them, the Court discourages the information of such attachment by rewarding mothers who deny fathers access to the child with control over the child's future.

In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1971) this Court rejected a state statute which freed children for adoption by third parties by presuming unwed fathers to be unfit parents. The state law was defective because, "Under the statute . . . the nature of the actual relationship between parent and child was completely irrelevant." *Lehr v. Robertson, supra*. 463 U.S. 258, 103 S.Ct. 2992. California Evidence Code Section 621 is similarly defective.

This case does not represent the clash of two sets of fundamental interests. The actual marital relationship of Carole and Gerald was not threatened by the judicial determination that Michael and Victoria are father and daughter. Whether Carole and Gerald maintain their marriage is a matter within their sole discretion. Nor does Gerald have a constitutionally protected right to be recognized as the father of any child his wife may bear. By contrast, Victoria will have no choice as to which relationships she maintains until she reaches adulthood. Only through judicial protection of her relationship with Michael may she retain its benefits, absent another change of heart on the part of Carole.<sup>22</sup>

Termination of an existing psychological and biological relationship cannot be justified by the public policy which

<sup>22</sup> It is, of course, Carole's changes of heart which created this dilemma in the first place. Sadly, Carole, Gerald and the California Courts have failed to recognize Victoria's right and need for emotional attachments which do not merely mirror those of her mother.

favors marital relationships.<sup>23</sup> Marriages have traditionally been protected because they provide some guarantee of commitment and continuity in childrearing. Here protection of the fiction of marital fidelity deprived the child of continuity in her relationship with Michael and encouraged her to forget, or deny that the family relationships she had enjoyed in her early childhood had ever occurred.<sup>24</sup>

The destruction of the relationship between Michael and Victoria was not essential to the protection of the relationship between Gerald and Victoria. Should the marriage between Carole and Gerald end, Gerald may seek stepparent visitation. By contrast, whatever changes in the family form may occur, Victoria will only have an opportunity to enjoy her relationship with Michael should Carole and Gerald soften in their insistence upon Michael's exclusion from Victoria's life.

Protection of the integrity of the marital family, while a worthy goal in the abstract, breaks down in the face of the child's need for preservation of her parental relationships. That a father is married to another never interferes with the rights of father, child, mother, or state to seek establishment of the parent and child relationship. Yet surely his marriage would be equally threatened by the revela-

<sup>23</sup> See *Smith v. Association of Foster Families*, *supra*. at 433 U.S. 843-844, 97 S.Ct. at 2109, recognizing that the marriage relationship is important because of the role it plays in promoting a way of life through the instruction of children.

<sup>24</sup> In his dissenting opinion in *Rivera v. Minnich*, *supra*, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. at 3008, Justice Brennan noted, "In such cases what I wrote over 35 years ago is still true: 'in the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.' *Cortese v. Cortese*, 10 N.J.Super. 152, 156, 76 A.2d 717, 719 (1950)."

tion that he had fathered a child extramaritally. Similarly, the integrity of the marital family is certainly threatened by husband's rejection of parental status within the first two years after the child's birth, or by the concerted action of the mother and biological father within the two-year period.

## II. APPLICATION OF EVIDENCE CODE SECTION 621 DEPRIVED VICTORIA OF HER RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

California Evidence Code Section 621 is a legislative anomaly which survived the adoption of the Uniform Parentage Act. While California Civil Code Section 7002 proclaims that, "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents," Section 621 attaches profound significance to the mother's marital status.

California's Supreme Court has identified the following factors as the public policies underlying Evidence Code Section 621:

1. Preservation of the integrity of the family unit;
2. Encouragement of marriage;
3. Promotion of child welfare by ensuring adequate support;
4. Insurance of the stability of titles and inheritance;
5. Protection of the child from traumatic changes in family structure.

*Estate of Cornelious*, 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984); *In re Lisa R.*, 13 Cal.3d 636, 119 Cal.Rptr. 475

(1975); *Michelle W. v. Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986).

As applied here, the presumption did not serve any of those goals. A public policy which protects family integrity requires the protection of functioning familial relationships not formal structures. Marriage could not be encouraged here since marriage between Michael and Carole was impossible in view of Carole's marriage to Gerald. Nor was the marital relationship between Carole and Gerald destroyed by the revelation of Carole's infidelity. The state's policy in favor of ensuring the economic support of children was not served, since both Michael and Gerald have, and have announced their intention to continue to, contribute to Victoria's support. In fact, had Michael and Victoria prevailed, more money would have been available for Victoria's support as Michael would have made child support payments to Carole and would have contributed directly to Victoria's support when she was in his care. Similarly, once an adjudication of paternity is made, rights of inheritance will be clarified. Moreover, Gerald and Michael remain free to provide for Victoria by will. Most importantly, application of the statute did not protect the child from traumatic changes in family structure. Rather, application of the statute created a traumatic change in family structure.

None of the asserted state interests are sufficiently strong to outweigh Victoria's and Michael's interests in the preservation of their relationship with one another.

The California appellate court found that Victoria and Michael's interests in preserving their relationship are "outweighed by the state's interest in upholding the integrity of the family." (Jur.St. B15, B17). The family which the Court found most worthy of protection is the matri-

monial family, citing *Kusior v. Silver*, 54 Cal.2d 603, 619, 7 Cal. Rptr. 129, 140 (1960).<sup>25</sup> The Court of Appeal provides no analysis of why the state's interest in the matrimonial family ought to outweigh its interest and that of the child in promoting healthy development by protecting the continuity of established parent-child relationships. Nor does *Kusior* shed any light on those reasons.<sup>26</sup>

Had Michael been married, and Carole unmarried at the time of Victoria's conception, no court would have held that Victoria and Carole could not establish Michael's paternity.<sup>27</sup> Yet such an action would have impugned the

<sup>25</sup> "[T]here are significant reasons why the integrity of the family when husband and wife are living together should not be impugned."

<sup>26</sup> In *Kusior* the child was born nine days after entry of the final judgment of dissolution of marriage. The husband sought to avoid responsibility for child support by denying paternity, despite visits to wife during the separation. No putative father came forward seeking to establish a relationship with the child. Under today's version of the statute, Mr. Silver would have been entitled to seek blood tests to deny paternity. Since the child in *Kusior* had no relationship with any father, there was no interest to balance against the abstract integrity of the already dissolved marriage. The state's true interest in *Kusior* was ensuring that the child would be supported.

<sup>27</sup> The marital status of the putative father is irrelevant when the State, mother or child seek to establish paternity in order to obtain child support. See *Rivera v. Minnich*, *supra*. \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. at 3004, in which the issue of paternity is characterized as "Resolving the question of whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father . . ." Yet, as Justice Brennan recognizes in his dissent, once established, an adjudication of paternity will lead to the entire panoply of parental rights and responsibilities, "The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assume a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a well-spring far more profound than legal decree. Some

integrity of Michael's matrimonial family. Similarly, the statute grants the husband a two year period in which he may impugn the integrity of the matrimonial family and thus escape child support obligations, even if no putative father has identified himself. The mother and the putative father may conjointly challenge paternity and impugn the matrimonial family, even if the wife chooses to remain in the marriage. Thus if the state's true aim is to protect marriages, Evidence Code 621 is a particularly crude tool.

The reality is that monthly weekend visits between Michael and Victoria would have little or no effect on the marriage between Carole and Gerald. A marriage that would founder as a result of such visits has a very weak foundation and is unlikely to survive the other vicissitudes of daily life.

Application of Evidence Code Section 621 may withstand scrutiny in cases like *Kusior*, where no putative father is on the scene and thus there are no competing interests to the state's goal of ensuring economic support for children.<sup>28</sup> The most appropriate context for applica-

---

men may find no emotional resonance in fatherhood. Many, however, will come to see themselves far differently, and will necessarily expand the boundaries of their moral sensibility to encompass the child that has been found to be their own. The establishment of a parental relationship may at the outset have fewer emotional consequences than the termination of one. It has, however, the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime." *Id.* at 107 S.Ct. 3007

<sup>28</sup> In those cases where there was no biological father seeking to establish a relationship, courts have had no difficulty preventing the belated attempts of fathers to deny paternity and avoid support obligations. *Hess v. Whitsitt*, 257 Cal.App.2d 552, 65 Cal.Rptr. 45 (1968); *SDW v. Holden*, 275 Cal.App.3d 313, 80 Cal.Rptr. 269 (1969); *Keaton v. Keaton*, 7 Cal.App. 3d 214, 86 Cal.Rptr.562 (1970).

tion of the presumption are marriages of some duration, in which husbands and wives, seeking to avoid the constraints of no-fault marital dissolutions, in the heat of their anger throw into question the paternity of children who have well-established relationships with the husbands. In such cases, no putative father has come forward. California's Court of Appeal has found that the purpose of the two-year statute of limitations for motions for blood tests is to preserve psychological relationships. In *Marriage of Stephen B. and Sharyne B.*, 124 Cal.App.3d 524, 177 Cal.Rptr. 429 (1981) the court rejected the argument of a husband that the two-year statute of limitations was discriminatory. The court held that by age two a child reared in an intact marriage has established a psychological parent and child relationship with the husband which outweighs the biological relationship,

A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved and upon which liability for continued responsibility to the child might be predicated. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity . . . Where a strong social relationship to the child has not yet developed, the only basis for a duty on the husband's part to support the child is biological fatherhood of the child.

*Id.* 124 Cal.App.3d at 530-531, 177 Cal.Rptr. at 433, citing Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 Stan. L.Rev. 754 (1968) (*Tangled Web*).

The rationale for the conclusive presumption has shifted, as courts try to uphold it in the face of social and scientific change. This history was summarized by the

Court of Appeal in *Marriage of B.*, *supra.* 124 Cal.App.3d 528-531, 177 Cal. Rptr. 431-433:

Early California cases were able to justify the conclusive presumption in question on the ground that no competent evidence could be adduced to indicate who among those who had intercourse with the wife during the period of possible conception was the biological father of the child born to her. However, as blood tests became scientifically reliable so that they could exclude a husband as the biological father, the court's [sic] sustained the legislative mandate by unabashedly calling it a substantive rule of law. . .

The Legislature, at least prior to the amendment, used this conclusive presumption fiction for three public policy reasons, namely, (1) preservation of the integrity of the family; (2) protection of the innocent child from the social stigma of illegitimacy; and (3) a desire to have an individual rather than the state assume the financial burden of supporting the child. The Legislature, by its 1980 amendment to section 621, has recognized that blood tests are now reliable evidence on the issue of paternity. The conclusive presumption, however, has been retained subject to what amounts to a two-year statute of limitations on a husband's right to introduce such evidence.

The court concluded that the statute of limitations was enacted in response to *Tangled Web's* reasoning and its substitution of the psychological attachment for the prior rationales.

Until *Michael H.* California's Court of Appeal and Supreme Court applied Evidence Code 621 in a fashion which was protective of existing, functioning parent and child relationships.

In *Estate of Cornelious* 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984), an adult child sought to claim under her biological father's estate. The California Supreme Court held,

"The due process clause does not compel a holding equating the natural urge to look after one's flesh and blood with the equally natural but somewhat baser, impulse to take care of property one's biological father has failed to dispose of by will." The court noted that the adult child had grown up enjoying a psychological parent-child relationship with her mother's husband which outweighed the significance of the biological connection."

By contrast, in *Lisa R.*, 13 Cal.3d 636, 119 Cal.Rptr. 475 (1975) the California Supreme Court held that application of the conclusive presumption violated the father's due process rights under the Fourteenth Amendment. The biological father had established a psychological parent and child relationship with Lisa, which was interrupted by the mother's conduct. In dependency court proceedings, the biological father came forward and re-established his relationship with Lisa. Following the deaths of the mother and her husband, the state sought to free Lisa for adoption over the objections of her natural father. Citing *Stanley, supra.*, the Court held that "The question whether appellant, as one claiming to be Lisa's natural father, can rebut the presumption that Lisa is the issue of her mother's marriage must be resolved by weighing the competing private and state interests."

The Court accorded substantial weight to the actual facts surrounding Lisa's relationship with her natural father finding that by having lived with Lisa and contributing to her support the natural father's interests transcended those whose ties are purely genetic. While the state has an interest in a child's welfare, that interest is not defeated by preventing a putative father from offering evidence of his paternity. The Court disregarded the state's interest in ensuring the legitimacy of children, noting that the putative father undoubtedly intended to

legitimate the child. Here there was no marital family threatened, as the mother and her husband had died. Nor was the speedy resolution of disputes an adequate justification.

Application of the presumption served to preserve an established relationship in *Vincent B. v. Joan R.* 226 Cal.App.2d 313, 179 Cal.Rptr. 9 (1981). There a biological father sought to establish paternity when the mother cut off his access to the child seven years after birth. Although the biological father had been a frequent visitor, nothing in the opinion suggests that he had been introduced to the child as his father, and established a psychological parent and child relationship. Mother and her husband had divorced when the child was four years old. Application of the presumption served to protect the seven-year-old psychological relationship with the mother's husband.<sup>29</sup>

<sup>29</sup> The Court's reasoning that visitation with the biological father under Civil Code Section 4601 should be denied underestimates the capacity of children to manage multiple parental relationships. See *Rethinking Exclusive Parenthood*, *supra*, 70 Va. L. Rev. at 909-911, "... [R]ecent research does not bear out the conclusion that severing relations with parents or caretakers will resolve a child's loyalty conflicts. In fact, loss of contact with absent parents is more likely to aggravate those problems. Children of divorce who do not maintain contacts with their noncustodial parents suffer harm at every developmental stage; those who maintain ties with noncustodial parents adjust more easily to their new situations. Similarly, children in foster care who remain in contact with their parents experience fewer cognitive and psychological problems than do children whose bonds with their parents are completely severed. This is because a child's commitments to his past are a source of stability despite the instability of the family relationship. If his current placement is stable, contacts with former parents or caretakers are unlikely to confuse him as to the permanence of his new family unit and may be necessary to help resolve conflicting loyalties. With help from his foster parents he can learn to draw strength from the multiple

Existing relationships were preserved by application of the presumption in *Michelle W. v. Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1985). There the child's mother divorced her husband and married the biological father, who thus became a member of the child's household. Child (who did not have independent counsel) and biological father sought to eliminate the husband's visitation rights by establishing biological father's legal paternity. In upholding the trial court's application of Evidence Code 621, the California Supreme Court stressed that Michelle and her biological father were not threatened with the loss of their relationship with one another. The public interest in promoting family stability in *Michelle W.* was the interest in preserving the relationship between the child and her mother's ex-husband. The Court expressly left open the question of the validity of Evidence Code 621 when applied to intervene or prevent the establishment of a relationship between a child and a putative parent. *Michelle W.*, *supra*, 39 Cal.3d at 362 n.4, 216 Cal.Rptr. at 752 n.4 The Court of Appeal in this case closed that door.

While citing the language in *Michelle W.* recognizing the state's "interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability," (Jur.St. B18-B19) the Court of Appeal concluded that "the welfare of Victoria D. would be harmed,

relationships. Children whose parent's rights are terminated, on the other hand, are unable to benefit from the additional relationships, and they may experience heightened feelings of disloyalty.

The current legal framework of exclusive parenthood ignores children's needs to maintain continuous contact with parent figures, including their natural parents, and underestimates their ability to manage multiple parenting relationships. [Emphasis added].

not protected, if she were permitted to rebut the conclusive presumption of legitimacy."

The Court went on to hold that application of the conclusive presumption "notwithstanding this state's adoption of the Uniform Parentage Act, which rendered illegitimacy to be without any legal effect (*Michelle W. v. Ronald W.*, *supra*. 39 Cal.3d at p. 362, fn. 5), this resolution protects Victoria D. "against the social stigma of being branded a child of an adulterous relationship" (Citation omitted.)." (Jur.St. B18) In *Michelle W.*, California's Supreme Court rejected the argument that application of the presumption carried out the valid legislative purpose of protecting children from the stigma of illegitimacy. The Court held that "Even assuming that this argument is correct, this state's subsequent enactment of the "Uniform Parentage Act" (Civ. Code Sec. 7000 et. seq., added by States.1975, ch. 1244, Sec. 11, pp. 3196-3204) has rendered such a consideration to be without any legal effect." The Court noted that the Legislature intended, by enactment of the Uniform Parentage Act, to make "a revolutionary change in the law by abolishing the incidents of illegitimacy and establishing legal equality of children without regard to the marital status of their parents." *Michelle.*, *supra*. 39 Cal.3d at 362 n.5, 216 Cal.Rptr. at 752 n.5.

To the extent that any social stigma remains arising from the marital status of one's parents judicial consideration of the social stigma of illegitimacy was improper.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for the removal of an infant from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be out-

side the reach of the law, but the law cannot directly or indirectly, give them effect.

*Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984). The equal protection clause of the fourteenth amendment prohibits discrimination based upon parental marital status. *Gomez v. Perez*, *supra*.

Even if the concept of illegitimacy retained meaning in California, failure to presume Gerald's paternity would not render Victoria illegitimate. Michael is a presumed father under Civil Code Section 7004, and clearly initiated this action with the intent of assuming full parental responsibilities.

Cloaked under the question of solicitude for Victoria's potential ostracism as a bastard, is the issue of whether, having engaged in marital infidelity, Carole can use her marriage to deprive Victoria of her established relationship with Michael. During the periods of time in which Carole resided with Michael, both before and after the filing of the paternity action, she showed no particular concern for the actual or apparent integrity of her marriage. The marital relationship grew in significance when Carole fled to New York in avoidance of the California visitation order seeking refuge with Gerald.<sup>30</sup>

<sup>30</sup> The Los Angeles County Superior Court found Carole in contempt, and jailed her until such time as Victoria was returned to California to enjoy her visitation with Michael. Gerald, who had not appeared in the action until this point, returned Victoria to California and retained counsel. Thereafter he brought the motion for summary judgment which led to his establishment as Victoria's legal father on the basis of his marriage to Carole.

### III. ADJUDICATION OF VICTORIA'S PATERNITY AND VISITATION CLAIMS BY CONCLUSIVE PRESUMPTION IN SUMMARY JUDGMENT PROCEEDINGS, WITHOUT PERMITTING VICTORIA TO COMPLETE HER DISCOVERY DEPRIVED HER OF PROCEDURAL DUE PROCESS

Victoria's action to establish the parent and child relationship with Michael, and her action to preserve her relationship with him under California Civil Code Section 4601 were resolved in summary judgment proceedings prior to the completion of discovery. Victoria's motion to compel further discovery was dismissed by the court as it granted summary judgment. At their depositions, Gerald and Carole had asserted that no facts other than those going to the preliminary facts of Evidence Code Section 621 (marriage, cohabitation, non-sterility) were relevant.

Victoria contends that application of the conclusive presumption violated her rights to both procedural and substantive due process. Moreover, to the extent that the conclusive presumption has been rendered rebuttable under certain circumstances (See *Lisa R.* and *Michelle W.*, *supra.*), Victoria was entitled to complete discovery and to a hearing on the merits.

The nature of the required due process turns on balancing the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure. *Santosky v. Kramer* 455 U.S. 74, 754, 102 S.Ct. 1388, 1395 (1982).

"The extent to which procedural due process must be afforded . . . is the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 1017-1018 (1970).

As has been argued extensively herein, the interests at stake were profound and fundamental.

Summary judgment proceedings, particularly early in the discovery process, were inadequate to protect Victoria. A young child litigant, represented in the courts through a guardian ad litem, is at a particular disadvantage in summary judgment proceedings, which rely solely upon declarations. While the adults could provide their counsel with factual declarations, Victoria's counsel was dependent upon the findings of the court-appointed expert (whose report she sought) and the fruits of discovery. Victoria's discovery rights were cut off by the court. Had an evidentiary hearing been required, counsel for the child would at least have had the opportunity to challenge the declarations of Carole and Gerald through cross-examination. However, summary judgment proceedings are tried by declaration, and Victoria was deprived of her right to cross-examination.

To the extent that prior case law and the Constitution render Evidence Code 621 rebuttable, all of the surrounding facts and circumstances relating to Victoria's life became relevant. The procedure employed by the Court did not provide an adequate setting for the resolution of issues of this magnitude. Moreover, Victoria had claimed, independent of the determination of her paternity, that she was entitled to preserve her relationship with Michael through visitation rights. Under Civil Code Section 4601, such visitation is permissible if in the child's best interests. Victoria was entitled to a hearing on the merits in this regard. Had she been granted such a hearing, she could have called the expert witness to testify, and inquired, *inter alia* about the comparative impact of the "stigma of illegitimacy" and the loss of a psychological parent. Similarly, Victoria could have introduced expert

testimony about the importance of preservation of young children's attachments, and the expert could have elaborated upon and clarified the findings in his report. Summary judgment proceedings denied Victoria these opportunities.

The State interests in resolving such matters expeditiously are secondary to the child's interests in having them litigated fairly. As this Court noted in *Stanley, supra.*, litigation by presumption is always more efficient than is resolution of disputes on their merits through evidentiary presentations.

### CONCLUSION

California has deprived Victoria of the most important right of a child, the right to the continued care, love and guidance of one who stands in the role of both psychological and biological parent. California reached this result in the name of protecting the marital relationship between Carole and Gerald, a relationship which was in no way threatened by occasional visits between Victoria and Michael.

Victoria requests that this Court reverse the judgment, and restore the prior visitation orders.

Respectfully submitted,

LESLIE ELLEN SHEAR\*  
SHEAR AND KUSHNER  
15915 Ventura Boulevard  
Penthouse Suite Four  
Encino, California 91436  
(818) 501-3691

*Attorney and Guardian ad Litem for  
Appellant Victoria D., A Minor.*

(9)  
No. 87-746

Supreme Court, U.S.

FILED

JUN 7 1968

JOSEPH E. SPANJOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1967

MICHAEL H.,

*Appellant,*

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, Leslie Shear,

*Appellant,*

v.

GERALD D.,

*Appellee.*

On Appeal from the Supreme Court of California

**BRIEF ON THE MERITS FOR APPELLEE GERALD D.**

GLEN H. SCHWARTZ

(Counsel of Record)

16130 Ventura Boulevard

Suite 650

Encino, California 91436

(818) 995-3266

LARRY M. HOFFMAN

(Counsel of Record)

545 Avenue 26 West

Suite 201

Los Angeles, California 90065

(213) 225-1432

*Attorneys for Appellee*

Gerald D.

## QUESTION PRESENTED

Do the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution prohibit a state from enacting as part of its paternity law a statute which recognizes a husband as father of his wife's child and protects his relationship with the child against attack by a man who claims that the child was conceived as a result of his sexual liaison with the wife while she was living with her husband?

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED .....	iii
PROCEEDINGS BELOW .....	1
THE STATE STATUTE INVOLVED .....	8
SUMMARY OF ARGUMENT .....	11
ARGUMENT	
I. The Due Process Clause does not require that state paternity laws take into account the facts of biological paternity or the best interests of the child. ....	12
A. Introduction .....	12
B. Due Process Analysis.....	15
Michael's Interests .....	15
Victoria's Interests .....	19
The State's Interests .....	22
Weighing of Interests .....	26
II. The Equal Protection Clause does not require that state paternity laws treat all men and women alike. ....	29
CONCLUSION .....	32

## TABLE OF AUTHORITIES CITED

	Page
CASES:	
<i>Bellotti v. Baird</i> (1979) 443 U.S. 622 .....	19
<i>Board of Regents v. Roth</i> (1972) 408 U.S. 564 .....	15
<i>Caban v. Mohammed</i> (1979) 441 U.S. 380 .....	12, 13, 19, 30
<i>Cafeteria Workers v. McElroy</i> (1961) 367 U.S. 886.....	15
<i>Craig v. Boren</i> (1976) 423 U.S. 190 .....	30
<i>Estate of Cornelious</i> (1983) 35 C3d 461, 674 P.2d 245, app. dism. (1984) 466 U.S. 967 .....	9, 10, 24, 27, 28, 30
<i>Ferguson v. Ferguson</i> (1981) 126 Cal.App.3d 744, 179 Cal.Rptr. 108 .....	9
<i>Goldberg v. Kelly</i> (1970) 397 U.S. 254 .....	15
<i>Hess v. Whitsett</i> (1968) 257 Cal.App.2d 552, 65 Cal.Rptr. 45 .....	9
<i>Hicks v. Miranda</i> (1975) 422 U.S. 332 .....	27
<i>In re Lisa R.</i> (1975) 13 C3d 636, 119 Cal.Rptr. 475, cert. den. (1975), 423 U.S. 885, reh'g. den. (1975), 423 U.S. 885 .....	10, 17, 27, 29, 31
<i>In re the Marriage of B.</i> (1981) 124 Cal.App.3d 524, 177 Cal.Rptr. 429 .....	9
<i>Keaton v. Keaton</i> (1970) 7 Cal.App.3d 524, 88 Cal. Rptr. 562 .....	9
<i>Lehr v. Robertson</i> (1983) 463 U.S. 248 .....	12, 13, 16, 19, 26
<i>Meyer v. Nebraska</i> (1923) 262 U.S. 390 .....	12
<i>Michelle W. v. Ronald W.</i> (1985) 39 C3d 354, 703 P.2d 88, app. dism. sub. nom. <i>Michelle W. v. Riley</i> (1986) 474 U.S. 807 .....	9, 10, 27, 30
<i>Moore v. City of East Cleveland</i> (1977) 431 U.S. 494 .....	12

## TABLE OF AUTHORITIES CITED—Continued

	Page
<i>Nebbia v. New York</i> (1934) 291 U.S. 502 .....	15
<i>Pierce v. Society of Sisters</i> (1925) 268 U.S. 510 .....	12
<i>Quilloin v. Walcott</i> (1978) 434 U.S. 246.....	12, 13, 15, 16, 19, 29
<i>Reed v. Reed</i> (1971) 404 U.S. 71 .....	30
<i>Rivera v. Minnich</i> (1987) — U.S. —, 107 S.Ct. 3001.....	19
<i>S.D.W. v. Holden</i> (1969) 275 Cal.App.2d 313, 80 Cal.Rptr. 269 .....	9
<i>Santosky v. Kramer</i> (1982) 455 U.S. 74 .....	19
<i>Stanley v. Illinois</i> (1972) 405 U.S. 645 .....	<i>passim</i>
<i>Trimble v. Gordon</i> (1977) 430 U.S. 762 .....	12
<i>Vincent B. v. Joan R.</i> (1981) 126 Cal.App.3d 619, 179 Cal.Rptr. 9, app. dism. (1982), 459 U.S. 807 .....	9, 10, 23, 27, 29
<i>Vlandis v. Kline</i> (1973) 412 U.S. 441 .....	22, 23

## OTHER AUTHORITIES:

California Code of Civil Procedure Section 1962(5).....	8
California Civil Code Section 4601 .....	18
Evidence Code Section 621 .....	<i>passim</i>
Stats 1980, ch. 1310 Section 1 .....	9
Stats 1981, ch. 1180 Section 1 .....	9

No. 87-746

—o—  
In The  
**Supreme Court of the United States**  
October Term, 1987  
—o—

MICHAEL H.,

*Appellant,*

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, Leslie Shear,

*Appellant,*

v.

GERALD D.,

*Appellee.*

—o—  
On Appeal from the Supreme Court of California  
—o—

—o—  
**BRIEF ON THE MERITS FOR APPELLEE GERALD D.**  
—o—

**PROCEEDINGS BELOW**

On November 18, 1982, Michael H. commenced this proceeding in the Superior Court of the State of California for the County of Los Angeles for a declaration that he was the father of Victoria D., a minor who was then a year and half old, and relief, including orders that he have visitation with Victoria, dependent upon his claim of paternity. Named as defendants in the original complaint were only Victoria and her mother, Carole D.

In April, 1983, acting on its own motion, the trial court appointed a local attorney, who was a stranger to the parties, to represent the child. (R. 5.)<sup>1</sup> Upon her own petition, the court appointed attorney had herself appointed Victoria's guardian ad litem. (S.A. A-4) The attorney/guardian ad litem for Victoria has served in that dual capacity ever since, and she now appears before the Court pro se, as attorney for the guardian ad litem.

On April 11, 1983, Michael amended his complaint to add as a party Carole's husband, Gerald D., who had been married to Carole and living with her when Victoria was conceived and born. (J.A. 9)

The guardian ad litem filed a cross-complaint against Carole, Gerald, and Michael, alleging that Michael and Gerald both claimed to be Victoria's father, and seeking a determination of their competing claims and relief, including visitation and support orders, incident to that determination. (J.A. 14)

Although neither Michael's complaint, his first amended complaint, nor the guardian ad litem's cross-complaint were served upon him, Gerald appeared in the action on August 15, 1984. In his response to the pleadings of Michael and the guardian ad litem, Gerald denied Michael's claim of paternity and alleged that he, Gerald, was Victoria's father, and that Michael's claim was barred by provisions of California law, including Evidence Code Section 621. (J.A. 25, 27)

---

1. The following notation is used throughout this brief: "R." means the record on appeal; "J.A." means the Joint Appendix; "J.S." means the Jurisdictional Statement; and "S.A." means the Supplemental Appendix to the Jurisdictional Statement.

On October 19, 1984, Gerald filed a motion for summary judgment as to Michael's first amended complaint and the guardian ad litem's cross-complaint; the motion was based upon Section 621 (R. 166). In opposition, Michael filed his own lengthy affidavit offering evidence relating to his claim that he, and not Gerald, had provided the sperm which resulted in Victoria's conception, and setting forth the times during which his relationship with Carole permitted him access to Victoria (R. 345; J.A. 73), and the guardian ad litem provided the report of the court appointed psychiatrist who had interviewed, observed, and tested the parties. (R. 321; J.A. 41)

On January 28, 1985, Gerald's motion was heard and granted, and the trial court subsequently entered its judgment declaring Gerald to be Victoria's father and dismissing Michael's complaint and the guardian ad litem's cross-complaint. (J.A. 86)

Michael and the guardian ad litem appealed to the California Court of Appeal, which affirmed the judgment (J.S. B1). A Petition for Review by the California Supreme Court was denied (S.A. A-100). In 1987, two years after the summary judgment motion was granted, Michael and the guardian ad litem sought orders awarding Michael visitation with Victoria pending determination of the appeals; following a two day hearing, the request was denied. (S.A. A-82)

### STATEMENT OF FACTS

After several months of living and traveling together, on May 9, 1976, Gerald and Carole were married. (J.A. 1 and 5) Gerald and Carole resided together as husband and wife in every common respect. During 1978 Carole became pregnant by Gerald, but that pregnancy terminated by a miscarriage. (J.A. 6) A year later, Carole again became pregnant by Gerald, but that pregnancy was terminated by a therapeutic abortion. (J.A. 6)

In September 1980, Carole became pregnant for the third time in the marriage. (J.A. 6, 36) Gerald prepared for the birth of his first child by regularly attending Lamaze classes with Carole. (J.A. 2, 6) Gerald was not able to use his Lamaze coaching skills in that the baby was born one month premature by Caesarean section. (J.A. 2, 6) Nevertheless, Gerald was in the delivery room of Cedars Sinai Hospital in Los Angeles on May 11, 1981, participating in the birth of his daughter, whom he and his wife named Victoria. The birth was complicated by a collapsed lung and for the first twenty-four hours of Victoria's life Gerald remained in the hospital with his wife until their daughter was out of danger. (J.A. 2, 6) Gerald took Victoria and his wife to their Los Angeles home from the hospital five days after the birth, and thereafter lovingly took care of both his wife and their newborn daughter. (J.A. 2, 6)

Gerald was the proudest of fathers: one month after Victoria's birth, Gerald's mother and father traveled from their home in France to meet and visit with their new granddaughter. Later that summer Gerald's brother also came from France to meet the family's newest family member. (J.A. 2, 6)

While Carole pursued other interests, Gerald remained the constant, lovingly responsible father to Victoria, and was, in fact, most oftentimes Victoria's sole caretaker. (J.A. 2, 6) In October, 1981, for business reasons, Gerald was required to move to New York City where he was employed as a United States representative of a French oil company. (J.A. 2) For reasons that Gerald did not understand, Carole insisted upon remaining in Los Angeles, and Gerald reluctantly agreed that she and Victoria could remain in their Los Angeles residence. (J.A. 2 and 7)

According to Michael, he and Gerald's wife, Carole, engaged in acts of sexual intercourse during the period that Carole conceived Victoria. After Victoria was born, Carole told Michael that she believed that the child could be his. (J.A. 77) After Gerald moved to New York City, Carole, Michael and Victoria had blood tests performed at the University of California at Los Angeles. Those tests showed that there was a 98.07% probability that Michael H. is Victoria's biological father. (J.A. 77) Thereafter, Carole and Victoria lived with Michael in St. Thomas for two months, from January, 1982 to March, 1982. (J.A. 28)

After leaving Michael, Carole and Victoria resided with Gerald in New York for one month in the spring of 1982, and for another month during the summer of 1982, during which time Victoria was baptized at a ceremony attended by all of Gerald's family. (J.A. 36, 39) In the fall of that year, 1982, Gerald, Carole, and Victoria spent three weeks together in Europe, at which time Gerald and Carole agreed that they and Victoria would reside together in New York.

After the European vacation, Carole returned to Los Angeles with Victoria to make arrangements to move back to New York with Gerald, but was served with this action, filed by Michael on November 18, 1982. (J.A. 7, 78)<sup>2</sup> As a consequence of the lawsuit, Carole's plans to return with Victoria to New York were postponed, but on March 11, 1983, Carole and Victoria did return to New York where they resided with Gerald through June 1983. (J.A. 3, 7)

In July, 1983, Carole and Victoria returned to Los Angeles. During the period August, 1983 through April, 1984, Carole permitted Michael to stay with her and Victoria when he was in Los Angeles. Michael resided in St. Thomas during November, 1983, and most of December, 1983. He spent Christmas that year in Los Angeles with Carole and Victoria (J.A. 78-79), but he returned to St. Thomas on January 23, 1984, and did not return to Los Angeles until March 23, 1984. (J.A. 80)

During these intermittent periods in which Michael resided with Carole and Victoria, between August, 1983, and April, 1984, Michael's behavior was noticeably peculiar: he would lock himself in a room alone, sometimes for days at a time, refusing to come out; he would either be indifferent to Victoria, or tease her by telling her such things as "there are monsters in your bedroom at night." (J.A. 18) When Michael returned from St. Thomas at the end of March, 1984, Carole told him that she did not want him to stay in the apartment with her and Victoria. (J.A. 19) Michael refused to leave, and became more physically abusive toward Carole. (J.A. 19) On April 25, 1984, Carole

2. As of November, 1982, when Michael filed his complaint for paternity, he had spent only two months with the then 16-month old Victoria.

entered a closed bedroom in the apartment and discovered Michael sitting on the bed with Victoria. Michael's legs were stretched out, and on one leg he had placed several rocks in a line from his knees to his groin. Victoria was picking up the rocks one by one in a direction leading toward the groin. Carole also discovered photographs of Victoria in the nude taken by Michael. (J.A. 19-20)

Michael's "peculiar" behavior in Carole's apartment during the early part of 1984 is consistent with the court-appointed psychiatrist's subsequent psychological findings that Michael "exhibits virtually all of the characteristics associated with parents who engage in incestuous-type relationships." (J.A. 46) In his evaluation report, which was premised on the recommendation that Michael be recognized as the legal parent of Victoria, (J.A. 69) Dr. Stone recommended that Michael's interaction with Victoria be strictly limited and that he not be assigned major caretaking responsibilities, even to the extent of a "standard" visitation schedule, because of the potential harm to Victoria: "moreover, a completely blind analysis of projective tests by a third-party, Dr. Stephen J. Howard, raised questions regarding the *risk* of a sexual relationship between [Michael] and [Victoria]; in all areas [Dr. Howard's] analysis was entirely consistent with the independent interpretation of data by [Dr. Stone]." (emphasis in original) (J.A. 63-64)

On the other hand, Dr. Stone found Gerald to be a kind and intelligent man who has a real attachment to both

Carole and Victoria and who clearly demonstrates the capacity to be a fine parent. (J.A. 45)

Immediately after the rock incident, Carole and Victoria left Michael in the Los Angeles apartment, and did not return until after obtaining restraining orders to keep Michael at least 50 yards away from the apartment and Victoria's school. (R. 70-80) Within a month by the first of June, 1984, Carole had reconciled with Gerald and since that date, the family unit of Gerald, Carole and Victoria has happily maintained and grown together. (J.A. 37, 40)<sup>3</sup>

---

### THE STATE STATUTE INVOLVED

California Code of Civil Procedure Section 1962(5), the predecessor of Evidence Code Section 621, was enacted in 1872, when California's laws were first codified. That version of the statute provided, "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Apart from a

---

3. Appellants and Amici have grossly exaggerated the extent of Michael's relationship with Victoria. Michael resided with Carole and Victoria only a total of 7 months spread out intermittently over the first 35 months of Victoria's life. Thereafter, but for a Saturday and Sunday in November, 1984, in the office of a psychologist, and an additional Saturday and Sunday in mid-1984, and a Saturday and Sunday during the second week of January, 1985, Michael has had no contact with the now 7 year old Victoria. (J.A. 488.)

1975 amendment, adding the requirement that the husband not be sterile as a condition for application of the statute, the only substantive legislative changes in the law since 1872 consist of amendments enacted in 1980 and 1981 authorizing husbands and wives, respectively, to rebut the presumption under limited, specified circumstances. (Stats 1980, ch. 1310 Section 1 and Stats 1981, ch. 1180 Section 1)

Although the statute, by its terms, purports to deny any person (except the mother and husband under the 1980 and 1981 amendments) the opportunity to rebut the presumption, the California courts, having considerable experience with the law as applied in a wide variety of circumstances,<sup>4</sup> have refused to interpret it literally. As construed, Evidence Code Section 621 creates a presumption, that a husband is father of his wife's children, which arises upon proof of the preliminary facts (marriage, cohabitation, and physical possibility of conception by the

---

4. The statute has been invoked by the mother to defeat her husband's attempt to avoid his support obligations, *In re the Marriage of B.* (1981) 124 Cal.App.3d 524, 177 Cal.Rptr. 429, *Keaton v. Keaton* (1970) 7 Cal.App.3d 524, 88 Cal.Rptr. 562; by a man other than the husband to avoid support obligations in proceedings initiated by the mother, *Hess v. Whitsett* (1968) 257 Cal.App.2d 552, 65 Cal.Rptr. 45, or the child, *Ferguson v. Ferguson* (1981) 126 Cal.App.3d 744, 179 Cal.Rptr. 108, *S.D.W. v. Holden* (1969) 275 Cal.App.2d 313, 80 Cal.Rptr. 269; by the husband to defend his claim of paternity against the claims of a man purporting to be the child's natural father, *Michelle W. v. Ronald W.* (1985) 39 C3d 354, 703 P.2d 88, app. dism. sub. nom. *Michelle W. v. Riley* (1986) 474 US 1043, *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 179 Cal.Rptr. 9, app. dism. (1982) 459 U.S. 807; and by the heirs of the putative father to defeat the child's claim to their inheritance, *Estate of Cornelious* (1983) 35 C3d 461, 674 P.2d 245, app. dism. (1984) 466 U.S. 967.

husband) and which may be rebutted as provided in the statute or by any party whose interest in establishing the facts of the child's biological paternity outweighs the competing state and private interests in presuming the husband to be the father. *In re Lisa R.* (1975) 13 C3d 636, 648, 119 Cal.Rptr. 475, cert den. (1975) 423 U.S. 885, reh'g. den. (1975) 423 U.S. 885, *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623, app. diss. (1982) 459 U.S. 807, *Estate of Cornelious* (1983) 35 C3d 461, 467, 674 P.2d 245, app. diss. (1984) 466 U.S. 967, *Michelle W. v. Ronald W.* (1985) 39 C3d 354, 364, 703 P.2d 88, app. diss. sub. nom. *Michelle W. v. Riley* (1986) 474 U.S. 807.

The treatment accorded the statute by the California courts underscores the significance of the policies it promotes. In all but one case, upon determining that the mother and husband were married to one another and cohabiting at the time of conception, and that the husband was not then impotent or sterile, the trial court summarily entered judgment in favor of the party who invoked the statute, and the appellate court affirmed, even where the matrimonial family had been dissolved by divorce (*Michelle W.*, *Vincent B. v. Joan R.*) or by death of the husband (*Estate of Cornelious*), and regardless of whether the attack upon the integrity of the family came from without (*Vincent B.*, *Michelle W.*) or within (*Estate of Cornelious*, *Michelle W.*). The one exception was *In re Lisa R.*, where the California Supreme Court reversed a judgment based upon application of an indisputable presumption of paternity; that case arose out of juvenile court proceedings concerning a child whose mother and presumed father both were dead. Thus, as inter-

preted and applied by the California courts, Section 621 implements a policy which so values the traditional family that the state's interest in protecting it outweighs any competing interest whenever the state's interest is implicated.

---

### SUMMARY OF ARGUMENT

Although expressed in the terms of an irrebutable evidentiary presumption, California Evidence Code Section 621 is not a rule of evidence; nor is it irrebutable. Rather it is a substantive rule of law which recognizes a husband as father of his wife's child; that rule is applicable only in those circumstances where the state's interests in recognizing the husband as father are not outweighed by competing interests in according the rights of paternity to another man. Thus, as construed by California courts, Section 621 does not infringe upon rights protected by the due process clause.

Evidence Code Section 621 does not discriminate against unwed biological fathers, but, in fact, treats the rights of the unwed biological father the same as the rights of the biological married mother. Furthermore, since the statute is not an irrebutable presumption, and does permit the offer of evidence as to whether the governmental objectives would be achieved, in some cases the biological father or child may rebut the presumption, and in other cases they may not, and thus does not violate the Equal Protection Clause.

---

## ARGUMENT

### I.

#### THE DUE PROCESS CLAUSE DOES NOT REQUIRE THAT STATE PATERNITY LAWS TAKE INTO ACCOUNT THE FACTS OF BIOLOGICAL PATERNITY OR THE BEST INTERESTS OF THE CHILD.

### A.

#### Introduction

This Court has recognized that an unwed father has the right to a relationship with his child that, at least in some circumstances, may not be terminated by the state except in conformance with due process and equal protection requirements. *Stanley v. Illinois* (1972) 405 U.S. 645, *Quilloin v. Walcott* (1978) 434 U.S. 246, *Caban v. Mohammed* (1979) 441 U.S. 380, and *Lehr v. Robertson* (1983) 463 U.S. 248. The Court has also recognized the appropriateness of the state's preference for the formal family. See *Trimble v. Gordon* (1977) 430 U.S. 762, 769, *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 505, *Meyer v. Nebraska* (1923) 262 U.S. 390, *Pierce v. Society of Sisters* (1925) 268 U.S. 510. In the instant case, the Court is called upon to assess the constitutional adequacy of California's procedures for establishing paternity insofar as they favor the family when those principles collide.

Appellants contend that application of Section 621 to the facts of this case violated their rights to due process in that they were not afforded a hearing at which they would have proved Michael's claim of biological paternity and that Victoria's interests would better have been served if Michael, rather than Gerald, were recognized as her father.

Appellants do not fully develop their argument. Under the rule which has emerged from the Court's decisions in cases involving the rights of unwed fathers (*Stanley*, *Quilloin*, *Caban*, and *Lehr*), that more than a mere biological connection between man and child is required to support the claim of a cognizable interest in the relationship,<sup>5</sup> Appellants claim that their relationship qualifies for protection.<sup>6</sup> However, Michael fails to justify extension of the rule, formulated in cases involving undisputed paternity and unwed mothers, to this case in which paternity is disputed by the mother's husband who, by any measure, has developed a far more substantial relationship with the child than the putative father; and the guardian ad litem fails to establish that a child has a constitutional right to select between two competing claimants the one entitled to recognition as her father.

In addition, Appellants contend that the question of paternity turns on a consideration of the child's best interests. This is a remarkable deviation from the traditional approach, which considers that the question of the child's best interests lies beyond the question of paternity. Yet, they fail even to consider the implications: if the child's welfare is relevant, what justification is there for retaining biological paternity as a condition for standing

5. Michael admits that the naked claim of biological paternity does not give rise to an interest cognizable under the Constitution. "Of course, in those cases where the person who claims paternal rights has not established such a relationship with the child, he is without a constitutionally protected interest," (Brief for Michael H., 23, n.19.)

6. Clearly, Michael has made greater efforts and had more success in establishing a father-child relationship than did the Messrs. Quilloin and Lehr. However, his relationship with Victoria pales by comparison with the relationships involved in *Caban* and *Stanley*.

to compete with Gerald for recognition as Victoria's father? What is the standard by which the trial court would have determined the question, whether recognizing Michael or Gerald as Victoria's father would better promote Victoria's welfare? Who would have had the burden of proof, and by what quantum of evidence?

Appellants are unable to articulate their position fully because their arguments rest upon a fundamental misconception of the issues adjudicated and interests implicated in this proceeding. This was an action to determine *parentage*; Appellants' requests for orders allowing Michael *visitation* with Victoria were predicated upon their claims that Michael was entitled to recognition as Victoria's father.<sup>7</sup> Appellants were not afforded a hearing to establish the facts of Victoria's conception because, under Section 621, those facts are not relevant to the question whether Michael was entitled to recognition as Victoria's father; Appellants were not afforded a hearing to show that visitation with Michael would be in Victoria's best interests because, having determined that Gerald is

---

7. At the hearing on the motion for summary judgment, counsel for Michael contended that Michael could be awarded visitation even if Gerald were adjudged Victoria's father. The court replied that Michael had failed to assert that claim in his pleadings, and invited Michael to file an independent action (R. 485); Michael has declined the invitation. The statement of the guardian ad litem, that Victoria's pleadings sought visitation "independent of the determination of her paternity" (Guardian ad Litem's Brief on the Merits, 29) is simply not true; her cross-complaint sought a declaration of paternity and relief, including visitation and support orders, incident to that determination. In any event, the question presented in this appeal does not include the question whether the Constitution requires state laws to allow visitation to a non-parent over the parents' objections.

Victoria's father, the court never reached the question of Michael's right to visitation.<sup>8</sup>

## B.

### Due Process Analysis

Where application of a statute is challenged on due process grounds, the analysis begins with a determination whether due process requirements apply; that is, whether "the interest at stake . . . is within the Fourteenth Amendment's protection of liberty and property," *Board of Regents v. Roth* (1972) 408 U.S. 564, 571. If a protected interest is implicated, the state's interest must be identified, *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895, and the focus shifts from the nature to the comparative weight of the competing interests in determining the form of the hearing required before the state may act, *Goldberg v. Kelly* (1970) 397 U.S. 254, 263, and whether the means selected by the state to promote its interest "has a real and substantial relation to the object sought to be attained", *Nebbia v. New York* (1934) 291 U.S. 502, 525.

#### 1. Michael's Interests

Michael claims that his interest in a relationship with Victoria is entitled to protection under the rule which emerges from the Court's decisions in *Stanley, Quilloin*,

---

8. The confusion between the question of paternity and the question of visitation is most apparent in the amicus brief of the ACLU which contains the succinct, but incorrect, statement, "[Michael] does [not] seek to displace Gerald as a father to Victoria. What Michael has sought is the right to continue a relationship with Victoria through court awarded visitation rights. . . ." (Brief Amici Curiae of American Civil Liberties Union Foundation, 6).

and *Lehr*, which involved unwed fathers whose claims of paternity were undisputed and children whose mothers, too, were unwed. Michael's reliance on those cases is misplaced.

The interest of the unwed father implicated in *Stanley*, *Quilloin*, and *Lehr* was not merely the preservation of an existing or potential *relationship* between man and child, it was the preservation of an existing or potential *familial* relationship. In each case, the Court emphasized that the protection afforded the biological father's interest in his offspring derives from the fact that the Constitution protects family integrity, *Stanley*, 405 U.S., at 651, *Quilloin*, 434 U.S., at 255, *Lehr*, 463 U.S., at 248; but the implicit assumption in those cases, that a "family" consists of mother, biological father, and child, is what is at issue here.

Moreover, the statutes involved in the unwed father's rights cases (the presumption of unfitness in *Stanley*, and the rules concerning step-parent adoptions in *Quilloin* and *Lehr*) all were designed by the state to promote the welfare of children, and the validity of the statute could be measured by how well or poorly it served that state's interest as applied in each particular case. Thus, in *Stanley*, the ostensible purpose of the law which required removal of children from the home of their father was to protect the children, but it applied in all cases with equal force, whether or not it served that purpose. And the step-parent adoption laws in *Quilloin* and *Lehr* were designed to permit adoption by step-parents in just those cases where adoption would serve the children's interests, and the question was whether the statutes involved adequately

protected the biological father's right to advance notice of the adoption proceeding and an opportunity to be heard with respect to the question of the best interests of his child.

The validity of paternity laws, on the other hand, cannot be measured by how well or poorly they promote the interests of the children affected because the state does not purport to determine paternity in any particular case on the basis of the child's best interests. That the question of the child's welfare lies beyond the question of paternity is illustrated by the decision of the California Supreme Court *In re Lisa R.*, supra, 13 C3d 636. That case arose out of juvenile court proceedings involving a child whose mother and presumed father were dead. A man purporting to be the child's biological father sought to intervene, but was confronted with a statute similar to Evidence Code Section 621 in that it purported to deny putative fathers the opportunity to rebut the presumption of the husband's paternity. The putative father had a history of psychiatric problems and child abuse, and the state argued that its interest in the child's welfare was sufficient to outweigh the putative father's interest in proving paternity. The Court responded that "the question of [the putative father's] fitness to care for Lisa has not yet been placed in issue. The narrow question before us is whether he can submit evidence tending to establish parentage," 13 C3d, at 641-642, 649, n.14.

Without question, the decision whether to recognize Michael or Gerald as Victoria's father had a substantial effect upon the custodial rights of the parties. For example, while a man recognized as father is entitled to visitation absent a showing that such visitation would be de-

terminal to the child's welfare, California law allows visitation to non-parents, if at all, in the discretion of the court.<sup>9</sup> However, the fact that the judgment recognizing Gerald as Victoria's father had a significant impact upon Michael's rights to a relationship with Victoria is no reason to reverse the judgment; had Michael been recognized as Victoria's father, the judgment would have had the same effect upon Gerald's rights to visitation and custody. The impact upon Gerald's and Michael's rights was a consequence of the decision as to paternity, and not a factor in reaching that decision.

The question raised by Michael's appeal is whether the Constitution requires the state to prefer the child's biological father over the matrimonial family into which she was born, even though the mother's husband willingly assumed and has fulfilled the role of father to the child and the family is in tact. At stake was not Michael's interest in a relationship with Victoria, but his distinct and narrower interest in establishing that he is, and that Gerald is not, Victoria's father. While the Constitution may require the states to provide a procedure for determining the identity of a child's father when his identity is unknown or disputed, it does not require the states to recognize as father the man who impregnated the child's mother.

---

9. California Civil Code Section 4601 provides, "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child".

## 2. Victoria's Interests

The guardian ad litem's arguments would be appropriate if addressed to a committee of the California legislature considering a proposed amendment or repeal of Section 621. Citing statistics and sociological treatises, she contends that the paradigm of the traditional family is an anachronism, and that application of Section 621 is more likely to harm than to benefit Victoria under the circumstances of this case. However, it is not the function of this Court to pass on the wisdom of state policy; rather, the question is whether the Constitution prohibits the state from following the course it has chosen. On that question, the guardian ad litem has nothing to add to Michael's arguments.

Her contention, that Victoria has an interest at stake which is distinct from and not dependent upon Michael's, to wit, the right to choose her father, is not supported by any of the authorities cited. *Stanley, Quilloin, Caban*, and *Lehr*, as well as *Santosky v. Kramer* (1982) 455 U.S. 74 and *Rivera v. Minnich* (1987) — U.S. —, 107 S.Ct. 3001 all speak of the rights of fathers, not children. The one case that does discuss the constitutional rights of children, *Bellotti v. Baird* (1979) 443 U.S. 622, concerned a statute which required minors to obtain parental consent for an abortion, and this Court there recognized that the Constitution provides less protection to children than to adults.

Moreover, if Victoria were accorded the right to choose her father, the questions arise, "Who will make the

choice for the child?"<sup>10</sup> and "By what standard will that choice be made?"<sup>11</sup> In this case, the choice was made by the guardian ad litem, an attorney who has never met Victoria and whose knowledge of what is in her best interests is limited to what she read in a psychiatric report written in September, 1984.

The psychiatrist, who assumed that the marriage of Carole and Gerald was doomed (J.A. 47) and that Michael would be adjudged Victoria's father (J.A. 68), had found Gerald to be intelligent, sensitive, direct, open, insightful, objective, witty and poignant, that he experienced a real attachment to Victoria (J.A. 56), and that "regardless of Victoria's biologically (sic) heritage [Gerald] experienced himself as her father for the first year of her life and thus no 'facts' can erase that feeling presently," (J.A. 58). Michael, on the other hand, was found to possess "strong unmet needs for affection and dependency and underlying feelings of inadequacy fused with strong aggressive drive," (J.A. 59) and to exhibit "virtually all of the characteristics associated with parents who engage in incestuous-type relationships" (J.A. 43). The psychiatrist

---

10. While the guardian ad litem does not address this question, the amicus brief in her support bluntly states that the child should have the right to rebut the presumption "when deemed appropriate by the guardian ad litem" (Brief of Amicus Curiae of National Council For Children's Rights, 11).

11. Obviously, the child's welfare would be the guiding principle. However, there are many factors which affect the child's best interests. In this case, the guardian ad litem has focused upon preservation of a relationship. She might as well have favored Michael over Gerald on the basis of a comparison of their wealth, religion, ethnic or national origin, or theories of child rearing.

recommended that Michael's "interaction with Victoria be strictly limited," (J.A. 50).

How such a report might induce a conscientious guardian ad litem zealously to pursue a relationship for Michael with Victoria is not the question for decision in this proceeding; the question is whether the Constitution requires that the state entrust such decisions as choosing a child's father to an attorney appointed for the child who might act as Victoria's guardian ad litem did in this case.<sup>12</sup>

It is not disputed that a child has an important interest in assuring that some man is recognized as her father; the child's rights to support and to inherit, for example, depend upon such a determination being made. However, in a case where there are two men competing for recognition as the child's father, the child has no cognizable interest in participating in the process by which the choice between them is made; from the child's perspective, a rule which recognizes as her father her mother's husband works just as well as a rule which recognizes the man whose sperm resulted in her conception. Even if the child's best interests were a factor in determining paternity there is no reason to afford the child an opportunity to participate in the proceedings through her court

---

12. That report was also the sole basis for the guardian ad litem's efforts to win visitation for Michael with Victoria during the pendency of the trial court proceedings and, in 1987, when Victoria was twice as old as she had been when the report was written and more than two years after she had any contact with Michael, pending determination of the appeals. Indeed, the guardian ad litem concludes her brief with the request that *this* Court rely upon that report and award Michael visitation.

appointed guardian ad litem, who would be vested with the discretion to determine which man to favor, and the basis upon which to make that determination.<sup>13</sup>

### 3. The State's Interests

Appellants misconstrue the state's interests served by Section 621. They portray the statute as a means for conserving judicial resources by conclusively presuming to be true, and thereby avoiding litigation of, the factual statements that the husband is the biological father, that the biological father is unfit unless he was married to the mother, and that application of the statute is necessary and sufficient to maintain the stability of the mother's marriage. They insist that such a statute violates their procedural due process rights to prove false that which the state presumes to be true, and that their respective interests in a relationship with each other are more than substantial enough to outweigh the state's meager interest in judicial economy. For this argument, they rely upon *Vlandis v. Kline* (1973) 412 U.S. 441 and *Stanley v. Illinois*, (1972) 405 U.S. 645.

---

13. That is not to say that a guardian ad litem serves no useful purpose in an action such as this. She can assure that the question of paternity is resolved by the court after a hearing on the merits and without collusion among the adults. Thus, it was quite appropriate for the guardian ad litem to file her cross-complaint; in doing so, she precluded dismissal of the action or judgment by stipulation without her consent. Unfortunately, that is not how this guardian ad litem perceived her role; during the early stages of the case, before Gerald had appeared, Carole and Michael agreed that Michael would be adjudged Victoria's father, but the guardian ad litem did not object or insist that Gerald first be consulted; the only reason this case was not resolved by that stipulation was Carole's change of mind.

However, the presumption of Section 621 is not conclusive; as interpreted by the California courts, it may be rebutted by whomever has an interest in doing so more substantial than the competing interests served by application of the presumption. Thus, Section 621 is distinguishable from the statutes involved in *Vlandis* and *Stanley*, which allowed rebuttal of the presumptions there involved by no one, under any circumstance.

Moreover, the state does not purport to establish by presumption any facts relating to biological paternity, the fitness or unfitness of the biological father, or the stability of the mother's marriage. Rather, in cases where the statute applies, California considers the fact of biological paternity and (as in paternity cases not governed by Section 621, where biological paternity is dispositive) the fitness of the man identified as the father, to be irrelevant. While the state does have an interest in preserving matrimonial families, one that is well served by application of the statute in this case, the cases in which the statute was applied even after dissolution of the mother's marriage, such as *Vincent B. v. Joan R.* and *Michelle W. v. Ronald W.*, demonstrate that the statute must serve some other purpose than maintaining the stability of the mother's marriage.<sup>14</sup>

---

14. Appellants trivialize the state's interest in according respect to the matrimonial family by characterizing as an interest in preventing divorce, and they challenge Section 621 on the grounds that they were denied the opportunity to establish by discovery and at a hearing that application of Section 621 was neither necessary nor sufficient to save the marriage of Carole and Gerald. Thus, Michael complains that his right to due process included the right to a hearing which would focus on the stability of the marriage of Carole and Gerald (Brief for Michael H.,

(Continued on following page)

The most significant state's interests implemented by application of Evidence Code Section 621 under circumstances of this case are the policies of (1) promoting marriage; (2) maintaining the relationship that has developed between the child and presumed father; and (3) protecting and preserving the integrity and privacy of the matrimonial family *Estate of Cornelious, Kusior v. Silver* (1960) 54 C2d 603, 354 P.2d 657.<sup>15</sup>

The fact that the marriage of Carole and Gerald has managed to withstand Michael's claim and the enormous financial and emotional pressures imposed by this proceeding, and that fact that their marital family has flourished and grown, attests to the fact that application of the statute has served its purposes of encouraging marriage and protecting Gerald's relationship with Victoria.<sup>16</sup>

---

(Continued from previous page)

23), and the guardian ad litem states that recognizing Michael as Victoria's father and allowing him visitation "would have little or no effect on the marriage of Carole and Gerald" but, if it did, she would attribute any problems in the marriage to its fragility and not to Michael's periodic intrusions (Guardian Ad Litem's Brief on the Merits, 21). Ironically, the state's interest in protecting the marital family would be frustrated by subjecting it to just this sort of scrutiny by legal strangers.

15. Other state interests underlying Section 621 have been identified, including assurance of support for children, protecting children from the stigma of illegitimacy and from traumatic changes in family structure, and fostering stability of titles and inheritances, *Estate of Cornelious*, supra, 35 C3d, at 465.

16. Michael and the guardian ad litem choose to ignore the state's interest in protecting Gerald's parent-child relationship with Victoria, one which developed from September, 1980, when Victoria was conceived, until May, 1982, on Victoria's first birthday, when Gerald first learned of Michael's paternity

(Continued on following page)

With respect to the state's interest in the integrity of the matrimonial family, two of its important aspects are implicated under the circumstance of this case.

The first pertains to family privacy. During the trial proceedings, Carole and Gerald were deposed by the guardian ad litem and by Michael's counsel. Michael attended the deposition. A number of questions were asked which Carole and Gerald refused to answer upon the advice of counsel, who relied on Section 621. (Deposition of Gerald, R. 234-290, Deposition of Carole, R. 291-320) The deposition transcripts, the motions, and the responses to the motions amply demonstrate how well Section 621 serves to protect the privacy of a husband and wife subjected to this sort of a proceeding. But for Section 621, Gerald and Carole would have been required to testify, in the presence of Michael, about matters such as their sexual habits and practices with each other and outside their marriage, their finances, and their thoughts, beliefs, and opinions concerning their relationship with each other and with Victoria.

The second aspect of this state's interest in the integrity of the family which is implicated in this case is the state's interest in limiting its own intrusion into the family whenever possible and expressing a preference for the formal family. In a society which does not entrust to the

---

(Continued from previous page)

claim, and one which has continued to grow notwithstanding these proceedings. Indeed, it is astounding that Appellants purport to present a fair statement of the facts of this case by a summary hardly mentioning Gerald and saying nothing at all of his relationship with Victoria.

state the primary responsibility for rearing children, the rules employed to identify a child's parents have profound moral, emotional, economic, and legal consequences: the state recognizes one mother and one father for each child, and confers upon them, and only them, parental rights and duties of enormous scope, such as the right to name the child, to custody, to decide where the child will live, to impose discipline, and to make decisions about the child's education, medical treatment, and religious upbringing. For the same reasons the rearing of children is deemed beyond the province of the state, so is formulation of subjective standards by which the state will impose its judgment as to who is, and who is not, qualified to assume parental responsibilities.

The rule which recognizes the mother's husband as her child's father avoids unwarranted state regulation of family constituency, and reflects the importance of marriage "in developing the decentralized structure of our democratic society", *Lehr v. Robertson*, *supra*, 463 U.S. 248, 257. In the case of a marital family, the legal attachments between husband and wife and the respect accorded by the state to the formal family, create an environment in which the state's recognition of parental rights and its preference for the family reinforce each other: by insulating the family from state and private intrusion, the state frees parents to pursue their presumed natural inclination to act jointly in the best interests of their children.

#### 4. Weighing of Interests

In recent years this Court has dismissed appeals in three cases from California in which the appellants claimed denial of due process by application of Evidence Code

Section 621. *Vincent B. v. Joan R.* (1981) 126 Cal. App.3d 619, 179 Cal. Rptr. 9, app. dism. (1982) 459 U.S. 807; *Estate of Cornelious* (1983) 35 Cal.3d 461, 674 P.2d 245, app. dism. (1984) 466 U.S. 967; *Michelle W. v. Ronald W.* (1985) 39 Cal. 3d 354, 703 P.2d 88, app. dism. (1986) 474 U.S. 1043. In these cases, the private interests of the appellants were far more significant than those presented herein by Michael or the guardian ad litem, and yet, the California courts found that the application of the statute was not violative of due process. The order of this Court dismissing the appeal in each of those three cases "constitutes a disposition of the case on its merits and carries the effect of *stare decisis*." *Hicks v. Miranda* (1975) 422 U.S. 332, 344.

In *Vincent B.*, Joan R. and Frank R. were married in May 1961. They remained married and cohabitated as husband and wife until separation and divorce in 1974. A boy was born to the marriage on May 11, 1970, and lived with Joan and Frank until the separation, when Joan was awarded custody of the child. In May, 1977, Vincent B. filed a paternity action wherein he alleged that he was the father of the child, with whom he had been visiting regularly, approximately three times per week, since the child's birth. In that case the trial court granted summary judgment and the Court of Appeal affirmed, holding "Appellant's interest in the instant case is not as great, nor entitled to as much constitutional consideration, as the interests of the putative father's in *Stanley* [*Stanley v. Illinois*, *supra*, 404 U.S. 645] and *Lisa R.* [*In re Lisa R.*, *supra*, 13 Cal. 3d 636]."

By contrast, in the instant case, Gerald and Carole have not divorced, but rather continue to live together as husband and wife, happily nurturing a growing family of which Victoria is the oldest child. Additionally, unlike Vincent's seven year continuous relationship with the child, Michael's relationship with Victoria has been limited to only seven months spread out intermittently over the first thirty-five months of seven year old Victoria's life.

In the *Estate of Cornelious*, a child claiming to be the daughter of the deceased introduced blood-test evidence showing that both she and the deceased had the sickle-cell anemia trait and that her mother's husband (her presumed father) did not have that trait. The probate court applied Evidence Code Section 621 and held that the deceased was not the child's father. The California Supreme Court affirmed, holding that substantial State interests outweigh the child's private interests in the decedent's estate.

In the instant case, Victoria's family is very much alive and well, and the state's interest of preserving the integrity of the family weighs much heavier than in *Cornelious* where the child's presumed father had died and her mother favored the court action.

In *Michelle W.*, Judith W. gave birth to a child who was conceived during her marriage of Ronald W. while she was having an affair with Donald. Judith and Ronald separated four years after the child's birth and when they divorced, Judith was awarded custody and Ronald was granted visitation. Thereafter, Donald and Judith married. Since that marriage, the child lived in Donald's home and he held her out to be his natural child. Subsequently,

Donald and the child, aged six, through her guardian ad litem, brought an action to establish paternity. The trial court granted summary judgment pursuant to Evidence Code Section 621 in favor of the husband and against the putative father and the child. The California Supreme Court affirmed, concluding that the state's interest in "familial stability" outweighed Donald's and the child's interest in proving Donald's claim of parentage, even though Donald had established a new matrimonial family with the child and her mother, *Michelle W. v. Ronald W.*, supra, 39 Cal.3d, at 362.

Clearly, Michael H.'s interest in establishing paternity is not as weighty as the interest of the putative fathers in *Vincent B.* and *Michele W.*, and Victoria's interest, if any, is not as weighty as the child's interest in *Cornelious*. On the other hand, given the continued family in the instant case, the state's interest in maintaining the integrity of the family weighs even heavier than it did in *Vincent B.*, *Cornelious*, and *Michelle W.* Thus, the application of Section 621 to the instant case comports with the requirements of due process of law.

## II.

### THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT STATE PATERNITY LAWS TREAT ALL MEN AND WOMEN ALIKE.

The Appellants argue that California Evidence Code Section 621 constitutes an impermissible gender-based discrimination between biological mothers and putative fathers in two respects: (1) Section 621 allows the biological mother of the child to rebut the presumption that her hus-

band is the child's father, but the putative father is not allowed to rebut the presumption; and, (2) Section 621 allows a biological mother to remain a parent, but a putative father is precluded from asserting his parental rights.

Subsection (d) of Section 621 states: "The notice of motion for blood tests under subsection (b) may be raised by the mother of the child not later than two years from the date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." Thus, the plain language of the statute indicates that the rights of the natural married mother and natural unwed father are conditioned upon each other. Section 621 is distinguishable from the statute invalidated by this Court in *Caban v. Mohammed*. The statutory scheme that violated equal protection in *Caban* was such that only unwed mothers, and not unwed fathers, received hearings prior to a termination of child custody. Section 621, on the other hand, does not give the natural married mother any greater rights than it gives the natural unwed father.

Gender-based distinctions, "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. *Craig v. Boren* (1976) 423 U.S. 190, 197, *Reed v. Reed* (1971) 404 U.S. 71. In our due process analysis, we have articulated a number of reasons justifying recognition of the mother as a parent and Section 621's objective of protecting the integrity of the family into which the child is born. Contrary to Appellants' assertion, the objective of Section 621, to maintain the biological mother as a

parent, in all instances, while precluding a putative father from asserting his parentage if the child was conceived during marriage and the mother and her husband resist the putative father's challenge, bears a substantial relationship to the state's interest of assuring parentage for the child and protecting the family into which the child is born. If we were to accept Appellants' logic, and make Section 621 gender-neutral, since putative fathers cannot be forced to assert their parental rights, Section 621 would have to allow biological mothers to similarly walk away from their parental obligations, leaving a child with no parents!

Appellants are simply incorrect in arguing that the objective of Section 621 in maintaining the integrity of the family into which the child is born is defeated because the statute "precludes any hearing which challenges the husband's paternity . . ." (Brief for Michael H., page 29.) In our due process analysis we emphasize the fact that Section 621 is not an irrebutable presumption, and does permit the offer of evidence as to whether the governmental objective of maintaining the family unit would be achieved in the respective case. *In re Lisa R.* Unlike *Lisa R.*, in which the mother and presumed father were dead and thus there was no state objective to be maintained, Appellants herein are not able to rebut the presumptions under the facts of this case in which Gerald and Carole have remained married and are raising a growing family, of which Victoria is a part, but this does not mean that all putative fathers and all children are barred in all cases.

Thus, even though Appellants may not like how Section 621 is applied in this case, that California statute does not violate the Equal Protection Clause.

---

**CONCLUSION**

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

GLEN H. SCHWARTZ  
(Counsel of Record)  
16130 Ventura Boulevard  
Suite 650  
Encino, California 91436  
(818) 995-3266

LARRY M. HOFFMAN  
(Counsel of Record)  
545 Avenue 26 West  
Suite 201  
Los Angeles, California 90065  
(213) 225-1432

*Attorneys for Appellee  
Gerald D.*

FOR ARGUMENT

No. 87-746

Supreme Court, U.S.

FILED

JUL 11 1988

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

MICHAEL H.,

*Appellant,*

and

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,

*Appellant,*

v.

GERALD D.,

*Appellee.*

On Appeal from the Supreme Court of California

REPLY BRIEF OF APPELLANT, MICHAEL H.

*Of Counsel:*

JOEL S. AARONSON  
NEWMAN, AARONSON, KREKORIAN  
& VANAMAN  
14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

ROBERT A.W. BORAKS  
(Counsel of Record)  
BORAKS & LECKAR  
1818 N Street, N.W.  
Suite 405  
Washington, D.C. 20036  
(202) 785-3240

GEORGE KAUFMANN  
RONALD K. HENRY  
PAUL R. TASKIER  
DICKSTEIN, SHAPIRO & MORIN  
2101 L Street, N.W.  
Washington, D.C. 20037  
(202) 785-9700

*Attorneys for Appellant  
Michael H.*

# TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Caban v. Mohammed</i> , 441 U.S. 380 (1979).....	3
<i>Clark v. Jeter</i> , — U.S. — (Decided June 6, 1988) .....	7
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) .....	7
<i>In re Lisa R.</i> , 13 Cal. 3d 636, 119 Cal. Rptr. 475 (1975) .....	5
<i>Lehr v. Robertson</i> , 463 U.S. 248 (1983) .....	3
<i>Michelle W. v. Ronald W.</i> , 39 Cal. 3d 354, 703 P.2d 88 (1985), <i>app. dismiss. sub. nom. Michelle W. v. Riley</i> 474 U.S. 807 (1986) .....	5
<i>Vincent B. v. Joan R.</i> , 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), <i>app. dismiss. sub. nom. Hall v. Taylor</i> , 459 U.S. 807 (1982) .....	5
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1974) .....	6, 7
 <i>Statutes</i>	
California Civil Code § 7004 .....	6
California Evidence Code § 621 .....	<i>passim</i>

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-746

---

MICHAEL H.,  
and *Appellant,*

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,  
*Appellant,*

v.

GERALD D.,  
*Appellee.*

---

On Appeal from the Supreme Court of California

---

REPLY BRIEF OF APPELLANT, MICHAEL H.

---

**A. The Parties' Factual Contentions**

Given the procedural history and posture of this case, it is wholly inappropriate for Appellee to have proffered to the Court "facts" purporting to 1) minimize the relationship between Michael H. and Victoria D.; 2) denigrate Michael H.'s fitness as a parent; 3) aggrandize Gerald D.'s fitness as a parent; and 4) glorify the family environment created by the marriage of Gerald D.

and Carole D. It is patently obvious that if the California courts had not applied § 621 of the California Evidence Code to preclude inquiry into the factual merits of the parties' contentions all these matters would have been vigorously disputed. While this litigation was pending in the California Superior Court, however, Gerald D. and Carole D. succeeded in limiting discovery solely to matters pertinent to the facial applicability of § 621. Gerald D. then successfully persuaded the court below to apply § 621 to dismiss Michael H.'s case with no inquiry into the merits of any of the matters now asserted by Gerald D. as "facts." Thus, these assertions are not judicially cognizable facts, but merely the self-serving, untested allegations of a party who prevailed on the theory that an inquiry into such factual issues was, as a matter of law, unnecessary.

### B. Due Process

Appellee's due process argument is that the interests of the state served by § 621 outweigh the "private" interests of Michael and Victoria. Based on that proposition, Appellee states the essence of his position, and, in so doing, concedes the central point of the case:

Appellants were not afforded a hearing to establish the facts of Victoria's conception because, under Section 621, those facts are not relevant to the question of whether Michael was entitled to recognition as Victoria's father; Appellants were not afforded a hearing to show that visitation with Michael would be in Victoria's best interests because, having determined that Gerald is Victoria's father, the court never reached the question of Michael's right to visitation. Appellee's Brief at 14.

This frank statement of how § 621 operated in this case is clearly accurate. Whether this consequence was constitutionally permissible is the question presented, however, and this Court's rulings clearly show that it is not.

Resolution of the central issue in this case requires a fundamental determination which Appellee's brief never directly addresses—whether Michael H. has a liberty interest in being Victoria's father. Because Michael demonstrated that liberty interest in the ways established by this Court, *i.e.*, by demonstrating "a full commitment to the responsibilities of parenthood," *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) and by "com[ing] forward to participate in the rearing of his child," *Caban v. Mohammed*, 441 U.S. 380, 392 (1979), it is clear that § 621 as applied in this case deprived him of that liberty interest in his parentage and its attendant rights, such as visitation, all without a hearing.

Appellee identifies the state interests pertinent to this case as follows:

1. Promoting marriage;
2. Maintaining a relationship between the child and the mother's husband;
3. Protecting the privacy and integrity of the family relationship.

Brief for Appellee at 24-26.

Conceding the abstract legitimacy of these state interests, however, does not resolve the question presented by this case. These state interests might well be sufficient to justify, in the circumstances covered by § 621, precluding the claims of fathers based solely on a biological connection. This Court has made it clear that a man's biological connection in and of itself does not necessarily create a liberty interest in parentage. *Lehr*, 403 U.S. at 261. In addition, these state interests might justify including consideration of the mother's matrimonial family situation as a pertinent factor in adjudicating the filiation claim of a biological father with an established parental relationship. What Appellee argues,

however, goes much further. He contends that the state interests justify a denial of the right to be heard and that they require Michael H.'s liberty interest to be overborne.

Appellee states that the rule of § 621 is "applicable only in those circumstances where the state's interest in recognizing the [mother's] husband as father are not outweighed by competing interests in according the rights of paternity in another man." Appellee's Brief at 11. Where the "other man" is the biological father who has assumed parental responsibilities for custodial, financial and emotional support and has developed a loving parental bond with the child, this "weighing of competing interests" must employ the fundamental tool of due process—a hearing where the competing interests are propounded, tested and properly analyzed. Only then can the state determine that countervailing considerations justify denying recognition to that biological father's liberty interest in parentage and its attendant rights. Moreover, the state's generalized interest in promoting matrimonial family life is not by itself a sufficient justification for depriving Michael H. of his liberty interest.

This is not a situation where the balancing of a protected liberty interest with other competing private or state interests has led the state to choose a particular form of adjudicatory procedure. This is a case where the state has determined that competing state interests justify a denial of any hearing whatsoever. The weight to be given to the rights of biological fathers who have established a liberty interest in their parentage is determined *ab initio* under § 621 to be entitled to *no* due process, either substantive or procedural. Such liberty interests are conclusively presumed to be outweighed.

Appellee attempts to camouflage § 621's constitutional infirmities by arguing that, as interpreted by the California courts, the statute is not applied literally and the presumption is not irrebuttable. In truth, the only case in which the California courts have refrained from ap-

plying § 621 literally to avoid infringing upon a biological father's liberty interest is *In re Lisa R.*, 43 Cal. 3d 636, 119 Cal. Rptr. 475 (1975) where the mother and her husband were dead and the child was a ward of the state. Despite the lip service paid by the California courts to the need for a "balancing" process in the application of § 621, all the cases which have addressed the issue where the mother's husband is a party, including the instant case, have refused to recognize that a biological father can acquire a liberty interest which precludes the state from denying his claim of parentage without a hearing. See *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 703 P.2d 88 (1985), *app. dism. sub. nom. Michelle W. v. Riley*, 474 U.S. 807; *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), *app. dism. sub. nom. Hall v. Taylor*, 459 U.S. 807 (1982).

What Michael H.'s due process argument amounts to is the unremarkable proposition that the state may not deprive a citizen of a liberty interest without a hearing in which just grounds to do so are established. Perhaps because this proposition is so fundamental, Appellee has distorted and mischaracterized Michael H.'s argument. The most striking example appears at Appellee's Brief at 18:

The question raised by Michael's appeal is whether the Constitution requires the state to prefer the child's biological father over the matrimonial family into which she was born, even though the mother's husband willingly assumed and has fulfilled the role of the father to the child and the family is in tact [sic] . . . While the Constitution may require the states to provide a procedure for determining the identity of a child's father when his identity is unknown or disputed, it does not require the states to recognize as father the man who impregnated the child's mother.

Michael H. is not asking this Court to command the state to "prefer" him to Gerald D., nor to recognize him as

father solely because he impregnated Carol D. However, Michael developed a relationship with Victoria, parental in all respects, that went far beyond merely having impregnated her mother—or, as stated elsewhere in Appellee's Brief at 3, having "provided the sperm which resulted in Victoria's conception." Therefore, Michael H. is asking this Court to require the state to adhere to the Constitution and afford his acquired liberty interest the protections of due process.

### C. Equal Protection

Appellee argues that § 621 does not constitute gender-based discrimination against biological fathers because the standing of biological mothers to call for blood tests under § 621(d) is no greater than, and interdependent with, the willingness of biological fathers to acknowledge their paternity. This argument misses Appellant's point. The discrimination cited by Michael H. was not with respect to standing to call for blood tests, but with respect to the more basic issue of the exercise of parental rights. A biological mother is always permitted, absent clear and convincing evidence of unfitness, the rights of her parentage. A biological father who falls within the ambit of § 621, however—even where he has met the criteria for establishing a liberty interest under this Court's decisions, or fits the definition of a "presumed father" under the Uniform Parentage Act, California Civil Code Section 7004(a)(4) ("He receives the child into his home and openly holds out the child as his natural child")—can never assert parental rights unless the biological mother or her husband choose that he do so.

Appellee has completely ignored that portion of Michael H.'s equal protection argument which is based on the fact that § 621 creates a "statutory classification" which "significantly interferes with the exercise of a fundamental right." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1974). As such, the statutory classification "cannot be upheld

unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.*

Whether analyzed under the *Zablocki* standard or under the "intermediary" level of review pertaining to gender-based classifications, *Craig v. Boren*, 429 U.S. 190, 197 (1976), § 621 fails of constitutional application in this case. While, as previously stated, the articulated state interests of support, protection and encouragement of the matrimonial family may well be legitimate, the statutory classification is neither supported by these interests nor sufficiently well tailored. The primary deficiency is that § 621 makes no allowance for situations where the putative father's claim is based not merely on biological paternity but on having served as a father-in-fact and on loving and being loved by his child. The statute exempts from its coverage a number of situations where the integrity of the matrimonial family is no less implicated than it is in this case, and where the biological father may have established no liberty interest under this Court's criteria, *viz.* where the mother's husband wishes to avoid paternity; where the mother wishes to establish paternity in a cooperative third party; where the husband is impotent or sterile;<sup>1</sup> where the husband and mother are separated at the time of birth but resume cohabitation thereafter. The statute extends its coverage to numerous situations where there is no integrity to a matrimonial unit to protect, *viz.* the mother and husband are divorced; the husband is deceased; or where, as here, there has been a sufficiently profound breakdown of the matrimonial family that the putative biological father

<sup>1</sup> The exceptions for impotence and sterility are designed to preclude the application of a conclusive presumption when it is at odds with biological possibility. Given the present technology of blood testing, an HLA exclusion of the Mother's husband equally reflects biological impossibility. *Cf. Clark v. Jeter*, — U.S. — (Decided June 6, 1988), slip opinion at p. 8.

has served in a parental role to the child and as a *de facto* mate to the mother and has, for a period of time, lived in a family unit with both.

#### **D. Conclusion**

The critical elements in this case that Appellee's arguments fail to come to grips with are:

1. Michael H. acted as a father to Victoria, loved her, supported her, took her into his home, held himself out as her father, and was held out as such by her and her mother.

2. Because of the application of § 621 Michael H. was precluded from being heard to preserve and protect his liberty interest as a parent of Victoria.

3. As a consequence Michael H.'s relationship with Victoria has been severed, and he is bereft of all rights concerning her.

Accordingly, Michael H.'s constitutional rights to due process and equal protection of the law have been violated.

Therefore, the judgment below must be reversed.

Respectfully submitted.

ROBERT A.W. BORAKS  
(Counsel of Record)  
BORAKS & LECKAR  
1818 N Street, N.W.  
Suite 405  
Washington, D.C. 20036  
(202) 785-3240

GEORGE KAUFMANN  
RONALD K. HENRY  
PAUL R. TASKIER  
DICKSTEIN, SHAPIRO & MORIN  
2101 L Street, N.W.  
Washington, D.C. 20037  
(202) 785-9700  
*Attorneys for Appellant  
Michael H.*

#### *Of Counsel:*

JOEL S. AARONSON  
NEWMAN, AARONSON, KREKORIAN  
& VANAMAN  
14001 Ventura Boulevard  
Sherman Oaks, California 91423  
(818) 990-7722

(11)  
No. 87-746

Supreme Court, U.S.

FILED

JUL 11 1988

JOSEPH E. SPANIOL, JR.

~~CLERK~~

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

MICHAEL H. AND VICTORIA D.,  
*Appellants,*

v.

GERALD D.,  
*Appellee.*

On Appeal From  
Court of Appeal of California  
Second Appellate District

**REPLY BRIEF FOR  
APPELLANT VICTORIA D.**

LESLIE ELLEN SHEAR  
SHEAR AND KUSHNER  
15915 Ventura Boulevard  
Penthouse Suite Four  
Encino, CA 91436  
(818) 501-3691

*Attorney and Guardian ad Litem for  
Appellant Victoria D., A Minor.*

**TABLE OF CONTENTS**

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
RESPONSE TO APPELLEE'S CONTENTIONS.....	4
RECENT CALIFORNIA AND U.S. DECISIONS .....	18

## TABLE OF AUTHORITIES

Cases	Page
<i>Caban v. Mohammed</i> , 441 U.S. 391, 99 S.Ct. 1760 (1979) .....	10
<i>Clark v. Jeter</i> , 88 Daily Journal D.A.R. 7163, No. 87-5565 (1988).....	12, 21
<i>Lehr v. Robertson</i> , 463 U.S. 254, 103 S.Ct. 2985 (1983)...	10
<i>Marriage of Stephen B. and Sharyne B.</i> , 124 Cal.App.3d 524, 530-51, 177 Cal.Rptr. 429 (1981).....	12, 16
<i>Michelle W. v. Ronald W.</i> , 39 Cal. 3d 354, 216 Cal.Rptr. 748.....	11, 12, 16
<i>Roe v. Superior Court</i> , 88 Daily Journal D.A.R. 8049, 8050 filed June 17, 1988.....	13, 18, 19
<i>Vincent B. v. Joan R.</i> , 226 Cal. App.2d 313, 179 Cal. Rptr. 9 (1981).....	16
CONSTITUTIONS:	
STATUTES:	
California Civil Code Section 4600 .....	4
California Civil Code Section 4601.....	8, 10
California Evidence Code Section 621.....	<i>passim</i>
Uniform Parentage Act.....	1, 3
BOOKS AND ARTICLES:	
Family Service America, <i>The State of Families: 1984-1985</i> (1984) .....	1
E. Rubin, "Legitimacy and Illegitimacy" <i>The Supreme Court and the Family</i> (1986).....	2, 4, 5, 7, 9
Stone and Shear, "Boundaries and Limitations in Child Custody Evaluations: A Proposal for Standards," <i>Proceedings of the 25th Annual Meeting of the Association of Family Conciliation Courts</i> (1988).....	15
Vaughn, Diane <i>Uncoupling: How Relationships Come Apart</i> (1986) .....	20

## INTRODUCTION

This appeal presents the Supreme Court for the first time with a case involving doctrines arising out of the concept of illegitimacy in a state which has adopted the Uniform Parentage Act. Victoria asserts that having enacted the Uniform Parentage Act, which relies substantially on biological paternity and specifically makes parental marital status irrelevant, California has deprived her of substantive due process, procedural due process, and equal protection by retaining a conclusive presumption which determined her paternity on the sole basis of her mother's marital status. The presumption that a woman's husband is the father of her child is an anachronistic remnant of a repealed statutory scheme, which in turn, is derived from the common law. In a society where divorce and nonmarital sexual relationships were rare, where wives assumed primary responsibility for child-rearing and husbands assumed primary responsibility for economic support, most children may have been reared in a household consisting of a husband, wife and their biological children. A State could properly conclude that the well-being of children born to married women as a result of extramarital sexual conduct was best preserved by perpetuation of the fiction that the husband had fathered the child. Otherwise the child might find itself without economic support, and socially rejected by the community. But "[t]he traditional nuclear family with the husband working to support his dependent wife and children had become an exception rather than the rule and is now typical of fewer than 10 percent of all households." Family Service America, *The State of Families: 1984-1985*, pp. 7-15, 23, 32, 60, 72-77.

Victoria is deprived of substantive due process in that the statute ignores her fundamental protected interest in

the preservation or restoration of her established relationship with Michael H.

Victoria is deprived of procedural due process<sup>1</sup> in that

---

<sup>1</sup> "Due process means procedure that is either fair or not fair in a particular context. The factual situation again determines the outcome. Proper application of both constitutional standards depend, therefore, on a realistic understanding of social facts rather than a picture of society that is biased and distorted by being viewed through outmoded stereotypes. Although the Supreme Court knows that its duty is to decide cases on the basis of constitutional principles rather than social science data, its assessments of constitutional fairness and equality will be invalid if they are not based on some degree of understanding of social facts. This does not mean that a court must undertake an independent inquiry in order to understand the underlying substance of a dispute. Most cases dealing with social issues now present some documentation in the briefs.

"Just as *Brown* illustrates the relationship between constitutional doctrine and shifting social facts, so also it illustrates one of the important roles of the Supreme Court—that of a facilitator of social change. Popular institutions, charged with the task of keeping the law in tune with new conditions, are sometimes immobilized, checked, balanced, fragmented, and efforts to introduce new social policies become stalled in wars between opposing forces stagnating behind permanent Maginot lines. The Supreme Court, as self-appointed guardian of the Constitution, has some responsibility in its own right for keeping legal rules in harmony with fundamental principles. In many of the great conflicts of the past, it has accepted the obligation and changed the law to bring it into line with new obligation and changed the law to bring it into line with new circumstances and perceptions. In these crucial cases, "pivotal cases" like *Brown*, it is possible to see the Court acting not as a maker of law, but as a remover of obstacles to the proper functioning of the political process. Reaching back to invigorating constitutional principles, the Court breaks a stalemate, cuts the Gordian knot and frees a new alignment of political forces to work out a new political solution. The initial problem is not necessarily "solved," but the terms of the conflict are redefined and the battle is resumed on different grounds. E. Rubin, "Introduction" *The Supreme Court and the American Family* (1986) at pp. 4-5.

the statute conclusively presumes that her best interests are met by conferring the rights, responsibilities and status of fatherhood on her mother's husband, regardless of the surrounding individual and societal facts and circumstances. Moreover, adjudication of such significant results in summary judgment proceedings, without permitting adequate discovery, made it difficult for the court to properly balance the competing interests and determine whether the statute could properly be invoked to preclude a continued family relationship between Michael and Victoria.

Victoria is deprived of equal protection, because although the Uniform Parentage Act establishes that parental marital status has no impact on the child's status, she belongs to a class of children whose relationships are still established solely with reference to maternal marital status. The statutory scheme has an inherent gender bias, presuming that a focus on maternal marital status best protects child welfare. This is based in turn, upon the inaccurate assumption that the principal role of mothers is child-rearing and the principal role of fathers is economic support. Thus paternal marital status is never relevant, but maternal marital status is critical to insure that mother and child are not economically abandoned by mother's husband. Although the professed rationale is protection of marital families, only maternal marital families are so protected. The problem is that these social assumptions no longer accurately reflect contemporary American society.<sup>2</sup> Moreover, by defining Michael H. as a

---

<sup>2</sup> "... [I]ndividual judicial decisions still reveal a great reluctance to examine traditional stereotypes about the family, even as social and economic pressures are causing monumental changes in the family itself. The law, precedents and statutes, assumes a familiar family pattern, as well as settled traditional male and female roles.

nonparent, California has denied Victoria the "frequent and continuing contact" with him that California Civil Code Section 4600 promises all children whose parents have separated, unless such contact would be detrimental to the child. Maintenance of a special classification for children based upon maternal marital status cannot withstand the "intermediate scrutiny" afforded classifications based upon legitimacy under equal protection doctrine.

Further, since Victoria's rights to relationships are intertwined with those of her parental figures, she was deprived of equal protection to the extent that Evidence Code Section 621 treated Michael H. differently than other parents who are not married to the person with whom they conceive and bear children.

This reply brief responds to the contentions of Appellee's Brief on the Merits, and the impact of recent decisions of the U.S. Supreme Court and the California Court of Appeal.

#### RESPONSE TO APPELLEE'S CONTENTIONS

Appellants and Amicae ask the Court to consider the definitions of "parent," "non-parent," "father," and "family" in the context of constitutional protection. Appellee's

---

Judges and justices are deeply attracted to the familiar pattern. Their own family experiences and training have created deep psychological commitments to certain family forms. In addition to personal and political convictions about what family life should be, their institutional obligation to apply time-honored principles colors their judgments even when these views conflict with new social facts. *It is clear from facts and figures now being collected about American families that very few families actually conform to the preferred model, a model that is perhaps largely mythological.*" E. Rubin, "Introduction" *The Supreme Court and the American Family* (1986) at pp. 3-4. [Emphasis added.]

brief ignores that core question and engages in semantic manipulation in support of a particular narrow family ideology. For example, Appellee uses the term "family" to refer only to a husband, wife and their child, ignoring the other types of familial relationships.<sup>3</sup> Similarly, Appellee argues that "the question presented in this appeal does not include the question whether the Constitution requires state laws to allow visitation to a non-parent over

---

<sup>3</sup> In *The Supreme Court and the American Family* (1986), Eva Rubin reviews Supreme Court decisions regarding family issues in an effort to identify the "ideology of the family" which underlies the opinions. Rubin writes:

Although family-related cases on the Court's docket present legal and constitutional problems, they also provide a sampling of the social problems generated by major changes taking place in the structure of American life in a time of "cultural disintegration and social transformation." If, as Arthur S. Miller has remarked, "Law is only a memorandum," legal rules incorporate the formulas for handling conflicts that society accepts at any given time. In order to provide a basis for handling conflicts effectively, however, the solutions that the law offers must be relevant to society's real problems and give answers in line with contemporary expectations. When the older, traditional solutions contained in the law are no longer acceptable to society at large, legislatures and courts must change or reinterpret the legal rules. There has been very rapid change in family life and in standards of personal behavior in the last forty years, but as yet no consensus has been reached as to what is happening, where we are going or what we are ready to accept as the norm. The traditional rules covering many social relationships no longer reflect settled patterns of behavior, and, as one might expect, conflicts between what the law posits and the way people actually behave frequently end up in the courts.

"State law has always regulated the basic patterns of marriage, divorce, sex, morality and even some aspects of child-rearing and living arrangements, although there has also been an unspoken agreement that the state should leave some things to private negotiation and not intrude too deeply behind the domestic curtain. The old rules favor the family as a social and economic unit. But the basic fact is that the role of the family in American society today is in flux." E. Rubin, "The Ideology of the Family" *supra.*, at p. 12.

the parents' objections." (A.B. at p. 14, note 7). Rather the issue is whether the relationship between Victoria and Michael H. bears enough of the characteristics of a parent and child relationship to entitle it to legal recognition and protection either by establishment of the legal status of parenthood, or by continuation of visitation.

Appellee argues that Evidence Code Section 621 does not discriminate against unwed biological fathers because it treats their rights identically to the rights of the mother.<sup>4</sup> However, while the husband is given two years after the child's birth to challenge paternity, the biological father's rights are conditioned upon either denial of paternity by the biological father or the cooperation of the mother. By contrast, the rights of the husband are not conditioned upon any conduct of another person. He may act unilaterally. No matter what psychological attachments the child has formed, he or she is given no statutory right to establish a legal relationship with a biological and psychological parent.

Appellee characterizes the issue presented as "the constitutional adequacy of California's procedures for establishing paternity insofar as they favor the family when those principles collide." (A.B. at p. 12) This characterization misses the underlying and more significant question: which familial relationships are entitled to constitutional protection?<sup>5</sup> California's statute favors a particular family

<sup>4</sup> Appellee's Brief on the Merits (hereafter referred to as A.B.) at p. 11.

<sup>5</sup> "Although few cases raising questions about the legal and constitutional status of variant family forms have been decided at the Supreme Court level, state courts have been struggling with legal problems raised by the increasing experimentation with alternate life styles. The family is nothing, if not adaptable. There is a rich profu-

constellation at the expense of other significant family relationships.

Gerald D. misses the underlying definitional questions when he argues that

Appellants are unable to articulate their position fully because their arguments rest upon a fundamental misconception of the issues adjudicated and interests implicated in this proceeding. This was an action to determine *parentage*; Appellants' requests for orders allowing Michael *visitation* with Victoria were predicated upon their claims that Michael was en-

---

sion of family configurations and novel relationships on the contemporary social scene: persons not married but living together, with or without children, people living together for convenience and companionship, foster homes, communes, group homes, homosexual or lesbian "marriages." Relationships between children and their parents are no longer based simply on biological ties; divorce and remarriage have produced complicated constellations of step-parents, step-children and half-brothers and sisters. New kinds of legal problems have been raised by artificial insemination, surrogate mothers and test-tube babies. Most of these new family relationships have some but not all of the characteristics of traditional families, or fulfill some but not all family functions.

"An attempt to list the social needs that families fulfill would probably include the following: provision of secure relationships for sexual activity and procreation, provision of an environment suitable for child-rearing, creation of small, self-sufficient economic units, supplying of psychological and emotional support, and provision of care in sickness and old age. Many of the alternate family forms perform more than one of these functions, yet the law has been slow to characterize them as families. People living in these relationships are beginning to ask for the status, privileges and protections that the law affords more traditional families. There is a plausible argument for accepting, regularizing and extending legal protection to many of these family configurations in order to promote stability and to allow state regulation." E. Rubin "What is a Family?" *The Supreme Court and the American Family* (1986)

titled to recognition as Victoria's father."  
(A.B. at p. 14)

Evidence Code Section 621 defines the mother's husband as the child's father, disregarding biological and psychological paternity. Yet, if the mother is unmarried, biology alone, is ordinarily the basis for establishment of paternity, and its ensuing rights, responsibilities, and emotional and cultural ramifications. Among the rights of parenthood is the right to a continued relationship with the child. Among the responsibilities of parenthood is the obligation to provide economic support for the child. Thus appellants do not confuse the questions of paternity and visitation. Establishment of paternity is the statutory key to standing to preserve the relationship. This is particularly true in view of the holding that Evidence Code Section 621 also precluded Victoria's complaint to establish custody-visitation rights with Michael on the basis of their psychological or de facto parent and child relationship under Civil Code Section 4601.

Victoria (through her guardian ad litem) has never sought to "establish that a child has a constitutional right to select between two competing claimants the one entitled to recognition as her father." Rather, *she has sought to preserve her relationship with each*. Those relationships arose because of the actions and inactions of Carole, Michael and Gerald. Having established a psychological relationship with her biological father, Victoria has a right to the continuation of that relationship. Only Gerald and Carole have insisted that Gerald's paternal status is exclusive, and thus cast the issue in the context of a competition. Moreover, Gerald's relationship with Victoria is not threatened. At the periods in Victoria's life when it was threatened, Gerald took no steps to preserve it.

Statutes attempt to protect a child's welfare and best interests with a global, rather than a particularized focus. Thus Appellee accurately asserts that the "best interests" standard is not generally applied to paternity determinations (A.B. p. 13). However, Evidence Code Section 621, despite California's abolition of the status of illegitimacy through enactment of the Uniform Parentage Act, denies legal protection to some child-parent relationships and classifies certain children and parents on the basis of parental marital status. Determination of the constitutionality of such a classification requires consideration of the child's best interests. It is the Court, itself, not Appellants, which has introduced the concept of "best interests" into the equation.

*"Quilloin v. Walcott (1978) [held] that the equal protection principle did not require that the law treat married and unmarried fathers alike in all situations. Unmarried fathers do have substantive rights to the care and company of their non-marital children, but those rights can be overridden when the child's best interests are at stake. The Georgia law at issue in the case required the consent of both parents before a child born in wedlock could be adopted, but where the child was born out-of-wedlock, only the mother's consent was necessary, unless the father had legitimated his child. No question of fitness or unfitness was raised by the Georgia law; it quite simply treated married and unmarried fathers differently. The Court held that where there was a judicial finding that the child would be best served by allowing it to be adopted, a natural father's objections could be overridden without infringing on his parental rights.*

E. Rubin, "Legitimacy and Illegitimacy" *The Supreme Court and the Family (Supra.)* at p. 41.

To the extent that California, and Appellee seek to support the constitutionality of the statute by asserting

that application of the "balancing test" by California's Supreme Court has rendered it a rebuttable presumption, they must recognize that the child's best interests must be weighed as part of that balance. Thus the constitutionality of the statute must be considered, *inter alia*, in the context of what impact it has on the child.

This Court has distinguished between the rights of unmarried fathers who have a substantial relationship with their children *Caban v. Mohammed*, 441 U.S. 391, 99 S.Ct. 1760 (1979); *Lehr v. Robertson*, 463 U.S. 254, 103 S.Ct. 2985 (1983) and those for whom the tie is purely biological.<sup>6</sup> By doing so, it recognizes that the child's best interests play a meaningful role in the determination of whether a particular statutory scheme may be constitutionally applied to a particular family relationship.

Gerald purports to distinguish the substantive due process cases protecting the relationships between unwed

<sup>6</sup> This analysis ignores a practical reality. Absent a good relationship with the mother, a putative father may not even learn of the child's conception and birth. Under Evidence Code Section 621 her cooperation is a condition precedent to an opportunity to establish a meaningful relationship with the child. While it may be appropriate to require some efforts to do so, an actual relationship may not be essential if a father acts promptly to assume parental responsibilities and enforce parental rights. Even that requirement may work an economic discrimination as litigation of such issues practically requires sufficient funds to retain counsel, or sufficient education for self-representation. Here, until the Court circumvented the Evidence Code Section 621 issue and ordered pendente lite visitation under Civil Code Section 4601, Michael's opportunities to form and maintain his relationship with Victoria were subject to Carole's cooperation. Similarly, Gerald only enjoyed a relationship with Victoria when Carole chose to reside with or visit him. Despite a better statutory claim to visitation rights, Gerald did not seek them during his separations from Carole and Victoria.

fathers and their children as arising from "the implicit assumption in those cases, that a "family" consists of mother, biological father, and child. . ." (A.B. at 16). They are forced to read between the lines and rely upon "implicit assumptions" because there is no basis in Supreme Court precedent for distinguishing the rights of Michael H. and Victoria to a continued relationship with one another from the rights according to fathers and children in *Stanley*, *Quillon*, and *Lehr*.

Appellee argues that "the question of a child's welfare lies beyond the question of paternity." (A.B. 17) Were that true, the state would have no interest in ascertaining paternity and all paternity legislation would lack a rational basis. Society is appropriately concerned with allocating parental rights and responsibilities so as to protect children, and so as to ensure that, to the extent feasible, the responsibilities of economic support and child-rearing are borne by individual families rather than society as a whole. While a child's welfare is not the sole determinant of her paternity (if it were paternity trials would become "father of the year" contests) neither is the issue of the child's welfare meaningless in the context of paternity. All of the rationales given in support of paternity legislation, including those advanced by Appellee, and by California appellate courts<sup>7</sup> focus on the child's welfare. Thus the parent and child relationship is established to ensure the child economic support, inheritance rights, and continued parental care, love and supervision. The child's welfare was given as the rationale for applica-

<sup>7</sup> See *Estate of Cornelious*, 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984); *In re Lisa R.*, 13 Cal.Rptr. 636, 119 Cal.Rptr. 475 (1975); *Michelle W. v. Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986); and the appellate court decision in the instant case.

tion of Evidence Code Section 621 in *Marriage of Stephen B. and Sharyne B.*, 124 Cal.App.3d 524, 530-51, 177 Cal.Rptr. 429 (1981) which held that the social relationship of parent and child outweighed, "to the child at least," the biological relationship. Evidence Code Section 621's application was found to be salutary by the California Court of Appeal here because it purportedly protected Victoria "against the social stigma of being branded a child of an adulterous relationship." (Jur.St. B18).<sup>8</sup>

It is true that parental rights and responsibilities cannot be determined *solely* on the basis of a child's best interests. Yet it is also true that any scheme allocating such rights and responsibility must be substantially related to an important governmental objective. *Clark v. Jeter*, 88 Daily Journal D.A.R. 7163, No. 87-5565 (1988). Appellee contends that the important governmental objective is the protection of marital relationships. His analysis stops too soon. Neither appellee nor California courts have been able to articulate why marital family relationships should be entitled to greater protection than biological, psychological or social family relationships. Protection of the marital relationship is based upon the assumption that it is the optimal setting for childrearing and ensuring paternal financial responsibility. Appellee alleges that if Victoria is permitted to continue her relationship with Michael H., his marital relationship with

<sup>8</sup> That rationale has been explicitly rejected by the California Supreme Court. *Michelle W.*, *supra*. 39 Cal.3d at p. 362, fn. 5). Moreover, the record demonstrates the substantial benefits Victoria received from her relationship with Michael H., and the detriment she would suffer as a result of his exclusion from her life. The record contains no evidence that Victoria ever suffered from the stigma of illegitimacy, or even that such a stigma exists in contemporary American society.

Carole D. is threatened. Yet he fails to demonstrate why his marriage is threatened by recognition of Michael H. Certainly his marriage was threatened by many separations and by Carole's extramarital affairs. It would be no more threatened if Michael played a role in the rearing of Victoria than are the marriages in the substantial number of stepparent families in which children enjoy the care of more than two parental figures in more than one household. What would be threatened is the fiction (for Carole and Gerald) of marital fidelity. But preservation of such fiction cannot be sufficient in and of itself to justify the substantial loss that Victoria has suffered. The marital family would have been best protected by Carole and Gerald's adherence to its values. Protection of marital relationships, in an era in which adultery is not a crime and no-fault divorce is available, is the responsibility of the partners to the marriage, not the state.

Gerald further argues that no decisions hold that a child's right to establishment or preservation of the parent-child relationship is constitutionally protected. In the very recent case of *Roe v. Superior Court*, 88 Daily Journal D.A.R. 8049, 8050 filed June 17, 1988 (and therefore not yet final), the California Court of Appeal held that the interests of the mother and child "in establishing biological parentage outweigh the interests of the state in enforcing the conclusive presumption. It thus would be a denial of due process to preclude this action on the ground of the conclusive presumption." California itself, has recognized that children's interests may be sufficiently strong to outweigh the state interest.

Gerald argues that no standard for identifying the child's interest can be established because the child cannot articulate her own interests and such issues must be litigated on behalf of children by their guardians ad litem.

(A.B. 20)<sup>9</sup> Again evading careful analysis through semantic gamesmanship, appellee frames the question as "whether the Constitution requires that the state entrust such decisions as choosing a child's father to an attorney appointed for the child who might act as Victoria's guardian ad litem did in this case." Of course the trial court, not the guardian ad litem, is responsible for the determination of cases. The guardian ad litem of a young child must use his or her best efforts to identify the interests of a young child and articulate them for the court.<sup>10</sup> The adult

<sup>9</sup> This section of Gerald's brief then focuses on his complaints about the choices made by Victoria's guardian ad litem. He notes that the guardian ad litem has never met Victoria while failing to report that he and Carole failed to produce Victoria, once she had reached a sufficient age to confer with counsel, despite several court orders requiring that she be made available to her guardian in the offices of the Conciliation Court and in the offices of one of the court-appointed psychologists.

Gerald is also highly critical of the guardian's reliance upon the findings of the court-appointed psychologist (who he mistakenly identifies as a psychologist). Yet the use of mental health experts remains the most valuable way in which judges can obtain information about family relationships and their impact on children.

He also criticizes the guardian for her reliance upon the psychological evaluation in 1987, but fails to note that the Court rejected her request for a review evaluation. (Jurisdictional Statement Supplemental Appendix A-92) In making that determination the trial judge did not first meet and confer with Victoria, yet Gerald does not argue that the trial court was ill-equipped to determine Victoria's best interests.

<sup>10</sup> The guardian has a concomitant duty to protect the child, to the extent possible, from the stress and iatrogenic effects of the litigation process. Here the guardian recognized that interviews of the child by counsel would be less effective than assessment of the child and her family relationships by mental health professionals. Moreover, to the extent that various persons questioned Victoria about those relationships, the interview process itself might be unduly suggestive

parties are free to present their own positions as to what outcome would best serve the child, and the trier of fact adjudicates the matter. Here the trial court found, in granting pendente lite visitation, that preservation of the relationship between Victoria and Michael was in Victoria's best interests. (A-35-40) In granting summary judgment, the trial court did not act upon the basis of new evidence which led to the conclusion that preservation of the relationship would no longer benefit Victoria. Rather the trial court held that it lacked jurisdiction to preserve the relationship by virtue of the conclusive presumption of paternity.

Appellee identifies the state interests served by Evidence Code Section 621 as

- (1) promoting marriage; (2) maintaining the relationship that has developed between a child and presumed father; (3) protecting and preserving the integrity and privacy of the matrimonial family
- Estate of Cornelious, Kusior v. Silver* (1960) 54 C2d 603, 354 P.2d 657.

(A.B. 24)

Neither California's appellate courts, nor appellee can articulate how the conclusive presumption of paternity

and thus contaminate the findings of the mental health professionals.

Nor is it in a child's best interests to be directly asked to express a preference for one parental figure over another. Moreover, children frequently base expressions of preference upon unrealistic bases, such as the idealization of an absent parent, or a fear that an emotionally fragile parent would be unduly harmed by the child's expression of his or her true feelings. Consequently, information about a child's relationships with parental figures is best gained indirectly. Stone and Shear, "Boundaries and Limitations in Child Custody Evaluations: A Proposal for Standards," Proceedings of the 25th Annual Meeting of the Association of Family Conciliation Courts (1988).

promotes marriage. Men and women do not enter marriage with the intention that the wife will engage in extra-marital affairs secure in the knowledge that the state will render her husband responsible for her progeny. In fact, from the prospective husband's standpoint, such a policy might serve as a deterrent. Nor do the average bride and groom study the arcane provisions of the California Evidence Code before entering into marriage. Law only serves such a policy to the extent that the community is aware of it. Legislators and courts frequently assume a familiarity with law and legal process which does not exist in the lay community. A statute such as this one, designed to maintain a legal fiction, operated largely out of the sight of the general population.

Nor does the statute serve to ensure that married couples will not separate or divorce. Following Victoria's birth, and prior to initiation of this action, Carole and Gerald experimented with a variety of living arrangements. A review of the reported cases under Evidence Code 621 reveals that it is frequently invoked following the divorce of the marital couple. *Marriage of Stephen B. and Sharyne B.*, *supra.*; *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 216 Cal.Rptr. 748; *Vincent B. v. Joan R.*, 226 Cal.App. 2d 313, 179 Cal.Rptr. 9 (1981). As applied in those cases, the statute did not function to preserve marriages.

Maintaining an existing relationship between the child and her mother's husband is a legitimate public policy which the statute may serve in some contexts. Here, Gerald and Victoria, (like the biological father and daughter in *Michelle W.*, *supra.*) is not threatened with the loss of that relationship. Application of the statute is not limited to those cases where the child actually enjoys a relationship with her mother's husband. Nor does the child's

relationship with her mother's husband have any inherently greater value than her relationship with her biological father. Despite Appellee's protestations that the child's welfare is irrelevant to a substantive due process analysis the interests of the parties and the state in sorting through these tangled relationships must be seen in particular rather than general terms.

As noted in Victoria's Brief on the Merits, Evidence Code Section 621 preserves the apparent integrity of marriages, not their actual integrity.<sup>11</sup> The extent of a husband and wife's commitment to monogamy and marital fidelity is within their sole control and discretion. Legislatures have been able to devise methods for pretending that extramarital affairs have not occurred, but they have been unable to prevent their occurrence. Moreover, a system which seeks to deter only the wife's extramarital conduct is, in itself, suspect.

Nor does Evidence Code Section 621 serve the family privacy goals advanced by Gerald (A.B. 24-25). In fact, before Evidence Code Section 621 can be invoked, a party must demonstrate that at the time of conception the married couple were cohabiting and the husband was not sterile. The inquiry into the sexual practices of Gerald and Carole complained of by Gerald took place because of the existence of cohabitation as a preliminary fact which must be established before the presumption operates. Similarly, the inquiry into Gerald and Carole's finances was not intended to explore their economic status, but to determine whether their claim that they had cohabited at the time of Victoria's conception was true. Absent Evi-

<sup>11</sup> In fact, a case could be made for the proposition that the absence of such a presumption would encourage marital fidelity.

dence Code Section 621, that inquiry would not have taken place.

Nor does Gerald explain why a mother and her husband have a greater right to privacy about their sexual conduct than do unmarried persons, or a father and his wife. Had Gerald fathered a child outside of his marriage to Carole, he could not have invoked family privacy concerns to insulate him from the ensuing paternity claim.

In discussing Appellants' equal protection claims, Appellee argues

If we were to accept Appellants' logic, and make Section 621 gender-neutral, since putative fathers cannot be forced to assert their parental rights, Section 621 would have to allow biological mothers to similarly walk away from their parental obligations, leaving a child with no parents!

(A.B. 31)

State abandonment and neglect laws, and support enforcement laws force the putative fathers of children born to unmarried women to assume parental responsibilities. Similarly, both mothers and fathers may choose to surrender children for adoption, and thereby terminate parental relationships. In *Roe v. Superior Court, supra.*, application of the conclusive presumption would have left the child fatherless, since the mother's husband had disaffirmed paternity in the marital dissolution proceeding.

#### RECENT CALIFORNIA AND U.S. DECISIONS

California's most recent appellate review of family relationships arising under Evidence Code 621 illustrates the need for a clearer articulation of the balancing test in this context. California's legislature and Supreme Court have given lower courts no clear criteria by which the state's interests may be balanced against those of the individual

family members. Nor have they demonstrated a nexus between application of the presumption and actual preservation of the marital relationship. Thus California families find their families assessed on a case by case basis, by criteria which lead to great uncertainty as to which parent-child relationships will be given legal status.

In *Roe v. Superior Court, supra.* a putative father sought application of the conclusive presumption to shield him from paternal responsibilities, most particularly, support.<sup>12</sup> The child had been born during the marriage, but husband and wife separated nine months thereafter. Blood tests eliminated husband as a possible biological parent, and the parties stipulated in the dissolution proceeding that he was not the father. Following the separation of husband and wife, mother and child resided with putative father at various times after husband and wife's separation, including one period lasting seventeen months. After the mother and putative father separated, the putative father contributed support for eleven months. Thus child's family experience consisted of nine months with her mother's husband, and various periods in which she resided either with her mother or her mother and putative father. During her first four years of life, she had already experienced a variety of family forms. California's First Appellate District found that application of the presumption would deprive the child and the mother of due process of law. The court identified the state's

<sup>12</sup> While both "fathers" in Victoria's life seek to preserve their psychological parent-child relationship and have willingly assumed financial responsibility for her, the child in *Roe* was less fortunate. Neither her presumed father, nor her biological father felt a sufficient commitment to her to continue the psychological parent-child relationship or assume long-term financial responsibility following the end of their relationships with her mother.

interests as protection of family integrity and protection of the child's welfare.

However, Evidence Code Section 621 only comes into play when the partners to a marriage, through their conduct, have created a breach in the integrity of the marital family which has led to the creation of other family relationships. While the fact of marriage initially bespeaks a commitment to continued family life, such commitment cannot be assumed with respect to those families in which Evidence Code Section 621 issues arise. Protection of the apparent integrity of the marital family can only be achieved by the sacrifice of the other relationships which have come into being as a result of the choices of the parties to the marriage. The state has no more compelling interest in the protection of one particular type of familial relationship than another.

Nor does application of the statute result in the actual preservation of marriages. As can be seen from cases like *Roe*, the adult parties to these relationships make their decisions to couple and uncouple<sup>13</sup> without reference to the provisions of the California Evidence Code.

Nor can the balance properly turn on the status of the family relationships as they exist at the moment of the litigation. To do so assumes that family relationships will remain static. But we know, both from the demographic data previously cited, as well as from the facts of those cases which reach appellate courts, that family structures are cast in sand, which can not be legislatively transmuted to stone out of a desire to create idealized families. A court

<sup>13</sup> This terminology is used by Diane Vaughn, in her study of how people make transitions out of marital and nonmarital relationships. Vaughn, Diane *Uncoupling: How Relationships Come Apart* (1986)

which characterizes a biological and psychological father as a nonparent in order to preserve the illusion that the partners to the marriage remained faithful ultimately is gambling about the stability of the already foundering marriage. Absent a prohibition of divorce or separation, such a policy ignores reality.

Nor can the constitutionality of paternity statutes be determined on the basis of whether the initiator of the action sought to establish paternity in the context of protecting a psycho-social father and child relationship, to collect child support, or to determine inheritance rights. Once established, the parent and child relationship brings with it an entire range of legal, psychological, social, economic, and ethical consequences for the parties. Paternity cannot be re-litigated at another juncture, when a different aspect of the parent-child relationship concerns the parties. Whatever due process and equal protection criteria apply must consider all the dimensions of the parent-child relationship.

In *Clark v. Jeter, supra.*, this Court has again held that discriminatory classifications based upon sex or illegitimacy must be substantially related to an important governmental objective. In her Brief on the Merits, Victoria has previously noted that Evidence Code Section 621 was initially enacted in the absence of reliable scientific evidence of paternity. That objective has been obviated by "increasingly sophisticated tests for genetic markers [which] permit the exclusion of over 99% of those who might be accused of [or seek to establish] paternity, regardless of the age of the child." *Clark* at 88 Daily Journal D.A.R. 7166. California's courts then termed the presumption a substantive rule of law, and its legislature created a statute of limitations under which some but not all members of the family are granted a limited period of

time in which to introduce blood test evidence. California determines the paternity of most of its children based upon biological ties. Operation of the conclusive presumption, after the child has established a psychological relationship with her natural father cannot be justified. Experience, including the frequent application of the statute to ensure that ex-husbands continue economic support, demonstrates that husbands are not inherently more committed to parental responsibilities than natural fathers. Thus Evidence Code Section 621 cannot constitutionally be employed to efface an established psychological relationship between a child and her biological father.

Respectfully Submitted,

LESLIE ELLEN SHEAR  
SHEAR AND KUSHNER  
15915 Ventura Boulevard  
Penthouse Suite Four  
Encino, CA 91436  
(818) 501-3691

*Attorney and Guardian ad Litem for  
Appellant Victoria D., A Minor.*

**MOTION FILED**

No. 87-746

**MAY 4 - 1988**

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term, 1987

MICHAEL H.,

Plaintiff, Cross-Defendant  
and Appellant,

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, LESLIE SHEAR,

Defendant, Cross-Complainant  
and Appellant,

vs.

GERALD D.,

Defendant, Cross-Defendant  
and Appellee.

---

**ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF APPELLANTS  
AND  
BRIEF AMICUS CURIAE OF  
NATIONAL COUNCIL FOR CHILDREN'S RIGHTS  
IN SUPPORT OF APPELLANTS**

**MICHAEL L. ODDENINO, General Counsel  
NATIONAL COUNCIL FOR  
CHILDREN'S RIGHTS**

199 South Los Robles Avenue  
Suite 711  
Pasadena, California 91101  
(818) 584-8828

Attorney for AMICUS CURIAE

---

---

No. 87-746

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

---

MICHAEL H.,  
Plaintiff, Cross-Defendant  
and Appellant,

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, LESLIE SHEAR  
Defendant, Cross-Defendant  
and Appellant,

vs.

GERALD D.,  
Defendant, Cross-Defendant  
and Appellee.

---

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF APPELLANTS

---

The National Council for Children's  
Rights, Inc. (NCCR) hereby respectfully  
moves for leave to file the attached

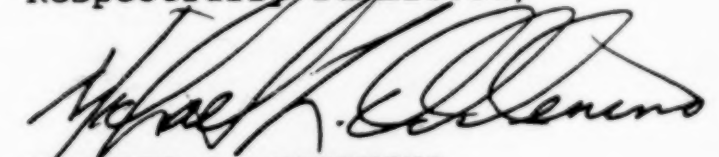
brief amicus curiae in support of appellants. The consent of the attorneys for appellants has been obtained. The consent of the attorney for appellee was requested but refused.

The attached brief focuses on whether the granting of a motion for summary judgment, pursuant to California Evidence Code section 621, impermissibly impinges on the minor child's fundamental liberty interest in a parent-child relationship such as to deny her equal protection of the law and due process of law. NCCR contends that section 621, as applied, unconstitutionally bars evidence concerning the child's best interests.

Counsel for Amicus is familiar with the issues involved in this case and believes there is a necessity for additional argument on behalf of the minor child's position that section 621

minor child's position that section 621 cannot constitutionally be applied to deny the child a determination of paternity based on scientific evidence or to terminate an existing parent-child relationship. The presentation of NCCR's perspective will permit a more complete analysis of the issues raised.

Respectfully submitted,



MICHAEL L. ODDENINO  
General Counsel  
NATIONAL COUNCIL FOR  
CHILDREN'S RIGHTS  
199 South Los Robles Avenue  
Suite 711  
Pasadena, California 91101  
(818) 584-8828

May 4, 1988

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
ARGUMENT.....	2
I. THE MINOR CHILD'S INTEREST IN A PARENT-CHILD RELATIONSHIP CONSTITUTES A FUNDAMENTAL LIBERTY INTEREST GIVING RISE TO THE FULL PANOPLY OF CONSTITUTIONAL PROTECTIONS.....	2
II. THE MINOR CHILD WAS DENIED EQUAL PROTECTION OF THE LAW BY THE LOWER COURT'S RULING THAT THE CONCLUSIVE PRESUMPTION OF CALIFORNIA EVIDENCE CODE SECTION 621 BARRED A DETERMINATION OF PATERNITY.....	6
III. THE MINOR CHILD WAS DENIED DUE PROCESS OF LAW BY HAVING A FATHER- CHILD RELATIONSHIP TERMINATED ON A MOTION FOR SUMMARY JUDGMENT WITHOUT ANY EVIDENCE AS TO THE CHILD'S BEST INTERESTS.....	12
CONCLUSION.....	18

## TABLE OF AUTHORITIES

CASES	Page
<u>Ashby v. White</u> , 2 <i>Ld. Raym.</i> 938, (1703).....	17
<u>Bell v. City of Milwaukee</u> , 746 F.2d 1205 (7th Cir. 1985).....	4
<u>Caban v. Mohammed</u> , 441 U.S. 380 (1979).....	11, 12
<u>Carson v. Elrod</u> , 411 F. Supp. 645, (E.D. Va. 1976).....	16
<u>Estate of Cornelious</u> , 35 Cal. 3d 461, 465, 198 Cal. Rptr. 543, 674 P.2d 245 (1984), <u>appeal dismissed</u> 466 U.S. 967, 104 S. Ct. 2337, 80 L. Ed. 2d 812 (1984).....	8
<u>Franz v. United States</u> , 707 F. 2d 582 (D.C. Cir. 1983).....	4, 5
<u>Franz v. United States</u> , 712 F. 2d 1428 (D.C. Cir. 1983).....	4
<u>Kelson v. Springfield</u> , 767 F.2d 651 (9th Cir. 1985).....	4
<u>Lassiter v. Department of Social Services</u> , 452 U.S. 18, 68 L. Ed. 2d 640, 102 S. Ct. 2153 (1981).....	3
<u>Lehr v. Robertson</u> , 463 U.S. 248 (1983).....	12

<u>Lisa R.</u> , 13 Cal. 3d 636 (1975).....	13
<u>May v. Anderson</u> , 345 U.S. 528, 97 L. Ed. 1221, 73 S. Ct. 840 (1952).....	3
<u>Michelle W.</u> , 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748, <u>appeal dismissed</u> , 106 S.Ct. 774 (1986).....	13-15
<u>Quilloin v. Walcott</u> , 434 U.S. 246 <u>reh'g</u> <u>denied</u> 435 U.S. 918 (1978).....	12
<u>Ruddock v. Ohls</u> , 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979).....	5
<u>Stanley v. Illinois</u> , 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).....	3, 12

## STATUTES

California Evidence Code Section 621.....	<u>passim</u>
--	---------------

## CONSTITUTIONS

United States Constitution.....	<u>passim</u>
------------------------------------	---------------

No. 87-746

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

---

MICHAEL H.,  
Plaintiff, Cross-Defendant  
and Appellant,

and

VICTORIA D., a minor by and through  
her Guardian Ad Litem, LESLIE SHEAR  
Defendant, Cross-Defendant  
and Appellant,

vs.

GERALD D.,  
Defendant, Cross-Defendant  
and Appellee.

---

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

BRIEF AMICUS CURIAE OF  
NATIONAL COUNCIL FOR CHILDREN'S RIGHTS  
IN SUPPORT OF APPELLANTS

---

INTEREST OF AMICUS CURIAE

NCCR is a non-profit, tax exempt  
organization based in Washington, D.C.  
dedicated to provide education, and  
research for the furtherance of child-

ren's welfare and children's rights under the United States Constitution and other applicable laws. NCCR has participated in this case on behalf of the minor child in the lower court and continues its participation herein because this matter involves profoundly significant issues regarding children's best interests and society's evolving recognition of those best interests.

#### **ARGUMENT**

##### **I. THE MINOR CHILD'S INTEREST IN A PARENT-CHILD RELATIONSHIP CONSTITUTES A FUNDAMENTAL LIBERTY INTEREST GIVING RISE TO THE FULL PANOPLY OF CONSTITUTIONAL PROTECTIONS.**

The issues raised in the instant case and the ultimate resolution of those issues will undoubtedly affect, in the most intimate and decisive fashion, the entire course of the minor child's life. While the adult parties may garner the bulk of attention in asserting and

denying various legal rights it is critical to consider that for the minor child, Victoria, there may be no greater moment in her life.

This Court long ago noted that a parent's right to "the companionship, care, custody, and management of his or her children" is an interest "far more precious " than any property right. May v. Anderson, 345 U.S. 528, 533, 97 L. Ed. 1221, 73 S. Ct. 840, 843 (1952). In Lassiter v. Department of Social Services, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 102 S. Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection'" quoting Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed 2d 551, 92 S. Ct. 1208 (1972). See also

Franz v. United States, 707 F.2d 582, 594-602 and 712 F.2d 1428 (D.C. Cir. 1983) (interest of non-custodial parent in consortium with child constitutionally protected); Kelson v. Springfield, 767 F.2d 651, (9th Cir. 1985)(parent has constitutionally protected liberty interest in the companionship and society of his or her child); Bell v. City of Milwaukee, 746 F.2d 1205, 1242-45 (7th Cir. 1985)(parent-child relationship a liberty interest protected by the Due Process Clause of the Fourteenth Amendment).

Child custody and paternity determinations involve a judicial intervention and restructuring of family life of the parties before the court. The fundamental liberty interests affected by such determinations demand the most vigorous protection of the law.

[A] parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult.

Franz v. United States, 707 F. 2d 582, 599 (D.C. Cir. 1983). (Emphasis added).

What greater right could any minor child have subject to judicial determination? None.

[T]he establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights. To hold a child bound prospectively by a finding of nonpaternity in a divorce action in which the child was not a party would be to allow the conduct of the mother to foreclose the most fundamental right a child possesses in our system of jurisprudence.

Ruddock v. Ohls, 91 Cal. App. 3d 271,

277-78, 154 Cal. Rptr. 87, 91 (1979).  
(Emphasis added).

Victoria's interest in the case at bar, the determination of her parent-child relationship with all the attendant consequences for her life, is unquestionably the most fundamental right she possesses in our system of jurisprudence. The child's right to consortium with her parents demands full constitutional protection.

**II. THE MINOR CHILD WAS DENIED EQUAL  
PROTECTION OF THE LAW BY THE LOWER  
COURT'S RULING THAT THE CONCLUSIVE  
RESUMPTION OF CALIFORNIA EVIDENCE CODE  
SECTION 621 BARRED A DETERMINATION OF  
PATERNITY.**

California Evidence Code section 621, subdivision (a) provides: "Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of

the marriage." Subdivision (b) allows the mother or the presumed father (husband) to rebut the presumption of subdivision (a) but makes no provision whatsoever for the child, such as Victoria, to rebut the presumption.

California Evidence Code section 621's absolute exclusion of the minor child as one who can rebut the presumption is a fatal constitutional defect as the section is applied to deny Victoria a fundamental liberty interest. Victoria is being denied her constitutional right to equal protection under the law guaranteed to her by the Fourteenth Amendment to the U.S. Constitution.

Victoria is denied the most fundamental right a child brings to the judicial system, that of establishing and preserving a parent-child relationship, by the application of section 621 which

allows mothers and presumed fathers to rebut the presumption of legitimacy but denies her that same opportunity.

The state's claim of a compelling state interest which allegedly shields section 621 from Victoria's equal protection challenge boils down to unsupported claims of family stability.<sup>1</sup> Not only is the purported state interest of dubious strength in light of a changing social structure characterized by unprecedented numbers of children of

---

1. The state interests underlying the section 621 presumption have been identified as 1) preserving the integrity of the family unit, 2) encouraging marriage, 3) ensuring financial support for minor children, 4) protecting children from the stigma of illegitimacy, 5) fostering the stability of titles and inheritances, 6) protect the child from traumatic changes in family structure, and 7) promote speed and efficiency of the judicial system. Estate of Cornelious, 35 Cal. 3d 461, 465, 198 Cal. Rptr. 543, 674 P.2d 245 (1984), appeal dismissed 466 U.S. 967, 104 S. Ct. 2337, 80 L. Ed. 2d 812 (1984).

divorce, step-parents, and non-traditional families but the statute itself provides the mother and presumed father with the right to rebut the paternity presumption while denying Victoria the same right.

This disparity in treatment is significant for purposes of equal protection analysis in that whatever state interest is implicated in the statute, the mother and presumed father are entitled to seek the disruption of the very state interest which the state must paint as so compelling as to defeat the child's fundamental liberty interest.

All identified state interests, when analyzed and balanced against Victoria's fundamental rights, arguably fail to adequately shield section 621 from her equal protection claim. This balancing equation, however, is not reached.

Regardless of how noble or compelling the alleged state interests might be in the present context, the statute destroys its own presumed high purpose.

The state interest self-destructs where the statute allows the mother and presumed father to institute an action which will produce the same undesirable consequences that are relied upon to deny Victoria her day in court.

The issue, therefore, is not only whether the state interests are so compelling as to defeat Victoria's fundamental rights but also whether the statute's mechanisms to achieve the state interests are constitutionally defective. Section 621's mechanisms fail to pass constitutional muster. It is not sufficient that the state's interests be laudable or even compelling but the classification must be constituted in a

way to reasonably further the state's objectives "so that all persons similarly circumstanced shall be treated alike." Caban v. Mohammed, 441 U.S. 380, 391 (1979).

In the present case there is no legitimate reason or necessity for treating the mother or presumed father in a manner different from the way Victoria is treated. The guardian ad litem for the minor child can and should be able to take the same statutory steps, when deemed appropriate by the guardian ad litem, available to the other parties. Where the mother or presumed father can, according to their whims, institute an action which would effectively destroy the statutory objectives, then those objectives, however noble, fail to cure the invidious denial of Victoria's fundamental rights. California Evidence

Code section 621, as applied, unconstitutionally denies Victoria's right to equal protection.

**II. THE MINOR CHILD WAS DENIED DUE  
PROCESS OF  
LAW BY HAVING A FATHER-CHILD RELATIONSHIP  
TERMINATED ON A MOTION FOR SUMMARY  
JUDGMENT WITHOUT ANY EVIDENCE AS TO THE  
CHILD'S BEST INTERESTS.**

Victoria and her putative (biological) father enjoyed a functional parent-child relationship similar to that protected in Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 380 (1979); cf. Quilloin v. Walcott, 434 U.S. 246 reh'g denied 435 U.S. 918 (1978) (rights of biological father depend on father's assumption of significant degree of responsibility for the care and nurturing of child) and Lehr v. Robertson, 463 U.S. 248 (1983) (mere biological link does not warrant equivalent constitutional protection to

that of ongoing parent-child relationship).

The minor child enjoyed a father-child relationship with the putative father until the relationship was interrupted by the trial court's granting of a motion for summary judgment.

The result was a brutal and mechanical cessation of the ongoing parent-child relationship constituting an impermissible trenching of Victoria's due process rights.

In Michelle W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748, 752, appeal dismissed, 106 S.Ct. 774 (1986), the California Supreme Court reiterated its holding in Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) that a once established parent-child relationship could not be defeated by a statutory conclusive presumption of paternity:

Following the United States Supreme Court's decision in Stanley v. Illinois, supra, . . . we held that the Evidence Code's preclusion of proof of paternity offended the constitutional guarantee of due process of law.

Michelle W., supra, at 752.

An identical conclusion is the only constitutionally acceptable one in the case at bar. Section 621, as applied, prevents Victoria from determining her genetic and cultural heritage as well as stripping her of a healthy and beneficial relationship she enjoyed with the putative father. As applied, section 621 will prevent Victoria from determining if she has certain genetic propensities that might require specific medical attention or in the alternative she might be erroneously subjected to certain unnecessary medical treatment.

Further, Victoria's interests in continuing the relationship with the

putative father will not deprive her of any relationship she might enjoy with her mother or the presumed father. See Michelle W., supra, at 756-757 (Bird, C.J., dissenting). However, section 621, as applied, has a devastating effect on Victoria's relationship with her putative father without allowing her to present one shred of evidence as to what would be in her best interests.

The mechanical and brutal application of section 621 in the present context does violence to Victoria's right to due process. Devices, such as conclusive presumptions, which are tempting for judicial expediency, are poorly equipped to deal with the individual needs of children of diverse backgrounds who will have their lives so intimately shaped by such decisions. "No bond is more precious and none should be more

zealously protected by the law as the bond between parent and child." Carson v. Elrod, 411 F. Supp. 645, 649 (E.D. Va. 1976).

Decisions which will affect, in the most intimate and decisive fashion, a child's entire life must be made only after scrupulous adherence to the most demanding principles of due process.

A custody or paternity decision may be as heavy and grave a decision as any court is ever called upon to make. The impact such decisions have on the lives of the children involved is unquestionably of such a magnitude as to command a comprehensive consideration of all relevant matters by the trier of fact.

Such consideration was lamentably absent in the case at bar. The state's overriding obligation to promote the best interests of a minor child was ignored in

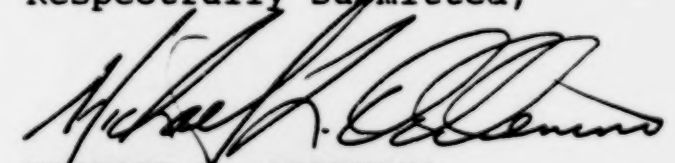
favor of expediency. The fundamental rights implicated in a section 621 determination, foreclose the possibility that the state could have other policy interests sufficient to justify Victoria's total deprivation of due process of law.

The facts of the instant case, as well as the ends of justice, dictate that the lower court's ruling be reversed. Only by restoration of her father-child relationship that was taken from her can the minor child have her fundamental rights protected. "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Ashby v. White, 2 Ld. Raym. 938, 953 (1703).

## CONCLUSION

In light of the fundamental rights of the minor child, the denial of equal protection, the deprivation of due process, the nature of the loss suffered, and a compelling concern for the child's best interests, the lower court's summary judgment pursuant to Evidence Code section 621 should be reversed with appropriate instructions.

Respectfully submitted,



MICHAEL L. ODDENINO  
General Counsel  
NATIONAL COUNCIL FOR  
CHILDREN'S RIGHTS  
199 South Los Robles Avenue  
Suite 711  
Pasadena, California 91101  
(818) 584-8828

May 4, 1988

MOTION FILED  
MAY 5 - 1988

No. 87-746

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

MICHAEL H. and VICTORIA D.,  
*Appellants,*  
vs.

GERALD D.,  
*Appellee.*

ON APPEAL FROM THE  
COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICI  
CURIAE AND BRIEF AMICI CURIAE OF  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
AND ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA IN SUPPORT OF APPELLANTS

JOHN A. POWELL  
HELEN HERSHKOFF  
STEVEN R. SHAPIRO  
ISABELLE KATZ PINZLER  
American Civil Liberties  
Union Foundation  
132 W. 43rd Street  
New York, NY 10036  
(212) 944-9800

PAUL HOFFMAN  
(Counsel of Record)  
STEPHANIE ROSS  
JOAN HOWARTH  
GARY WILLIAMS  
PATRICIA ERICKSON  
ACLU Foundation of  
Southern California  
633 So. Shatto Place  
Los Angeles, CA 90005  
(213) 487-1720

*Attorneys for Amici Curiae*

**MOTION OF THE AMERICAN CIVIL LIBERTIES  
FOUNDATION AND ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA FOR LEAVE TO FILE A BRIEF  
AMICI CURIAE IN SUPPORT OF APPELLANT**

The American Civil Liberties Union Foundation and the ACLU Foundation of Southern California respectfully move for leave to file the attached brief Amici Curiae in support of Appellants Michael H. and Victoria D.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, dedicated to the protection of the fundamental rights of the people of the United States. The ACLU of Southern California (ACLU/SC) is one of the affiliates of the ACLU with approximately 25,000 members in the Southern California area. The ACLU/SC filed an amicus curiae brief in this case in support of appellants before the California Court

of Appeal.

This case raises important issues involving the state's power to regulate complex relationships between parents--biological or otherwise--and children consistent with the constitutional guarantees of due process and equal protection. The ACLU has long been involved in litigation and other activities concerning these issues. Amici believe that the State of California has transgressed the constitutional limits on its authority by severing the relationship of an unwed biological father and his daughter, without affording any opportunity to assert or defend the strength of the parental or filial interests involved. In doing so, through Evidence Code § 621, in the circumstances of this case, the State has denied appellants due process

and equal protection of law. This brief addresses the due process concerns raised by the State's determination to sever the parent-child relationship pursuant to Evidence Code §621.

Appellants have consented to the filing of this brief amici curiae. However, the Appellee has declined to grant consent.

DATED: May 5, 1988

Respectfully submitted,

By PLH  
PAUL L. HOFFMAN

JOHN A. POWELL  
HELEN HERSHKOFF  
STEVEN R. SHAPIRO  
ISABELLE KATZ PINZLER  
American Civil  
Liberties Union  
Foundation  
132 W. 43rd Street  
New York, NY 10036  
(212) 944-9800

PAUL HOFFMAN  
(Counsel of Record)  
STEPHANIE ROSS  
JOAN HOWARTH  
GARY WILLIAMS  
PATRICIA ERICKSON  
ACLU Foundation of  
Southern California  
633 So. Shatto Pl.  
Los Angeles, CA  
90005  
(213) 487-1720

# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES . . . . .	vi
STATEMENT OF THE CASE . . . . .	1
SUMMARY OF ARGUMENT . . . . .	6
ARGUMENT . . . . .	13
I. <u>The Application of Evidence Code Section 621 To Terminate Completely Any Ongoing Relationship Between Appellants Michael and Victoria Denied Appellants Due Process of Law .</u>	13
A. <u>Appellants Have A Fundamental Right To Maintain Their Parent-Child Relationship . . . .</u>	13
B. <u>The Asserted Interests Supporting the Conclusive Presumption in Evidence Code Section 621 Are Insufficient To Justify The Termination of Appellants' Parent-Child Relationship . . . . .</u>	25

C.	<u>The Irrebuttable Presumption in § 621 Cannot Be Sustained As A Constitutionally Appropriate Means of Effectuating Any State Interest In The "Integrity of the Matrimonial Family"</u>	31
CONCLUSION		38
APPENDIX		A-1

TABLE OF AUTHORITIES		Page(s)
<u>Citations</u>		
<u>Bell v. Burson</u>		
402 U.S. 539 (1971)	. . . . .	31
<u>Cleveland Board of Education v. LaFleur</u>		
414 U.S. 632 (1979)	. . . . .	31
<u>Franz v. United States</u>		
707 F.2d 582 (D.C. Cir. 1983)	. . . . .	20, 33
<u>In the Matter of Baby M</u>		
FM-25314-86E (April 6, 1988), at 3	. . . . .	4
<u>Lehr v. Robertson</u>		
463 U.S. 248 (1983)	. . . . .	passim
<u>Levy v. Louisiana</u>		
391 U.S. 68 (1968)	. . . . .	19
<u>Meyer v. Nebraska</u>		
262 U.S. 390 (1923)	. . . . .	14
<u>Michelle W. v. Ronald W.</u>		
39 Cal.3d 354 (1986)	. . . . .	27
<u>Palmore v. Sidoti</u>		
466 U.S. 429 (1984)	. . . . .	27
<u>Quilloin v. Walcott</u>		
434 U.S. 246 (1978)	. . . . .	13, 15, 22, 23, 30
<u>Roberts v. U.S. Jaycees</u>		
468 U.S. 609 (1984)	. . . . .	15
<u>Rotary International v. Rotary Club of Duarte</u>		
107 S.Ct. 1940 (1987)	. . . . .	19

<u>Santosky v. Kramer</u>	
455 U.S. 745 (1982)	. . . . . 14, 19, 34
<u>Stanley v. Illinois</u>	
405 U.S. 645 (1972)	. . . . . passim
<u>Turner v. Department of Employment Sec.</u>	
423 U.S. 44 (1975)	. . . . . 34
<u>U.S. Department of Agriculture v. Murry</u>	
413 U.S. 508 (1973)	. . . . . 31, 32
<u>Usery v. Turner Elkhorn Mining Co.</u>	
428 U.S. 1 (1976)	. . . . . 33
<u>Vlandis v. Kline</u>	
412 U.S. 441 (1973)	. . . . . 31
<u>Weinberger v. Salfi</u>	
422 U.S. 749 (1975)	. . . . . 31, 33, 35

#### Statutes

California Civil Code § 4601	. . . . . 4, 5
Evidence Code § 621	. . . . . passim

#### Miscellaneous

<u>Tribe, American Constitutional Law</u>	
(2d ed., 1988) at 1618-25	. . . . . 32

### STATEMENT OF THE CASE

Amici adopt the facts as set forth at pages 11 to 13 of the Appellants' Jurisdictional Statement.<sup>1</sup> Certain key facts are highlighted below.

There is significant evidence in the record that appellant Michael H. is the biological father of appellant Victoria D. This evidence includes the results of a blood test showing a 98.07 percent probability that Michael is Victoria's biological father and statements from Carole D., the biological mother, that Michael is the biological father.

Moreover, Victoria and Michael had developed a warm, nurturing parent-child

---

<sup>1</sup> This case was resolved below in the context of summary judgment. The facts, therefore, should be viewed in the light most favorable to appellants. Thus, it must be assumed that Michael would be able to prove that he is the biological father of Victoria at trial.

relationship before the trial court's order severed their relationship. For a period of three months in 1982 and a period of nine months in 1983 and 1984, Michael, Carole and Victoria lived together as a family during Carole's estrangement from her husband, Gerald D. The child Victoria thus spent nearly one year of the first three years of her life in an explicit child-parent relationship with Michael. Victoria regarded Michael as her father and received from him parental support and affection. An expert's report confirmed that Michael and Victoria established a parent-child relationship during this important formative period. Jurisdictional Statement ("Jur. St."), at 13, n.2.

— Michael maintained a close bond with his daughter even after Carole returned to Gerald in the spring of 1984.

Initially, the parties agreed to maintain this relationship between Michael and Victoria through a three-year unsupervised visitation by Michael with his daughter that commenced in November 1984. This agreement was entered as an order of the court. Through her guardian, Victoria was a party to the agreement which recognized the sustaining nature of Michael's relationship with her. An October 1984 expert's report found that Michael was "the single adult in Victoria D.'s life most committed to caring for her needs on a long term basis....," (Jur. St., at 13, n.2), and that continuing the parental relationship between Michael and Victoria was in the child's best interests. The record in no way suggests that continuation of such unsupervised visitation would unduly upset the marital family in which

Victoria now resides.<sup>2</sup>

Nevertheless, on January 28, 1985, the trial court dismissed Michael's Petition for Declaration of Paternity and the Guardian Ad Litem's Declaration of a Parent-Child Relationship based upon the conclusive presumption in California Evidence Code § 621<sup>3</sup> which operated to vest parental rights in Gerald to the complete exclusion of Michael. The effect of the trial court's order was not only to prevent Michael from establishing paternity but also to preclude visitation under California

---

<sup>2</sup> As a state court judge noted in the highly publicized Baby M case, "Melissa is a resilient child who is no less capable than thousands of children of broken marriages who successfully adjust to complex family relationships when their parents remarry." In the Matter of Baby M, FM-25314-86E (April 6, 1988), at 3.

<sup>3</sup> Evidence Code §621 is set forth in full in the Appendix to this brief.

Civil Code § 4601.<sup>4</sup> Michael and Victoria were thus barred from continuing a parent-child relationship -- considered important to Victoria and in the child's best interest -- even under terms which did not unduly interfere with the current relationship between Carole and her husband.

This decision was affirmed by the California Court of Appeal on the ground that the state's interest in the sanctity of the family outweighed any

---

<sup>4</sup> California Civil Code § 4601 provides:

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the Court, reasonable visitation rights may be granted to any person having an interest in the welfare of the child.

rights Michael or Victoria had in these circumstances. The California Supreme Court declined to review this decision.

Significantly, Michael does not seek to remove Victoria from her home with Gerald and Carole. Nor does he seek to displace Gerald as a father to Victoria. What Michael has sought is the right to continue a relationship with Victoria through court awarded visitation rights and to provide support for her needs. Victoria, through her guardian, seeks the same relief.

#### SUMMARY OF ARGUMENT

This case involves the right of an unwed father to continue a loving, supportive relationship with a child who was born during the marriage and cohabitation of the mother to another man. Subsequent to the child's birth, Michael lived with his daughter Victoria

and her mother Carole as a family unit. During that period, Michael provided support for Victoria, gave her love and attention, and acquired a psychologically and emotionally significant place in her life. In equal measure, Victoria provided Michael with meaning and happiness. She treated him as a father and benefited from his nurture and care. The child's mother subsequently returned to her husband. Even after the non-marital family dissolved, Michael maintained a warm, mutually-supportive relationship with his daughter. Through unsupervised visitation -- approved by all parties and entered as an order of the court -- Michael assumed the role of non-custodial parent. Subsequently, Michael sought to formalize his relationship with his daughter and sought an adjudication of paternity and rights

of visitation.

Without considering the strength of the parent-filial relationship or the child's best interests, California Evidence Code § 621 simply extinguished the natural father's parental rights and barred him from any continuing relationship with his daughter. The statute provided Michael no opportunity to demonstrate the depth of his parental commitment to Victoria. Nor did the statute allow the child's interest in visitation or support to be meaningfully heard.

This Court has long recognized that the "relationship between parent and child," Quilloin v. Wolcott, 434 U.S. 246, 255 (1978), is an "intrinsic human right," Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977), and therefore

"constitutionally protected." Quilloin v. Wolcott, 434 U.S. at 255. Accordingly, where an unwed father has demonstrated parental commitment to his child, only "powerful countervailing interests" on the part of the State may justify interference with the fundamental parental rights that have developed over time. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Certainly no powerful countervailing interest is present in this case. To be sure, the State may have a legitimate interest, as asserted here, in the "integrity of the matrimonial family." Jur. St., at B16. However important this interest may be in the abstract, it cannot in the circumstances of this case justify the wholesale termination of the loving and supportive relationship that exists between Victoria and her natural

father Michael. The California courts were able to conclude otherwise only by ignoring the powerful parent-filial interests at stake and by giving no weight whatever to the best interests of the child.

This Court has shown far greater respect to the rights of an unwed father and his child where the pair have developed over time a loving and supportive parent-filial relationship. See Stanley v. Illinois, 405 U.S. at 645. So fundamental is the parent-child relation that this Court has subjected countervailing state interests and the statutory schemes that advance those interests to greater scrutiny than mere rationality. See Caban v. Mohammed, 441 U.S. 380 (1979). Such scrutiny is particularly appropriate where, as here, the challenged statute does not even

achieve the purported state goal. Here, while claiming to promote the child's welfare within the marital family, § 621 fails to provide the child with a stable familial environment. To the contrary, the challenged statute instead permits the marital father to avoid his support obligations by disclaiming paternity, thus leaving the child in uncertainty. By contrast, the natural, non-custodial father is denied any opportunity to provide love and financial support to his child.

The challenged statute underscores the vices of irrebuttable presumptions when used to resolve sensitive issues implicating fundamental rights such as the parent-child relationship. Evidence Code § 621 makes no attempt to balance the competing constitutional interests at stake, thereby ignoring the best

interests of the child in favor of a theoretical model of the nuclear marital family.<sup>5</sup> Where fundamental rights are at stake, this Court has strongly disfavored the use of irrebuttable presumptions. As a matter of due process, the application of Evidence Code § 621 to terminate the significant parent-child relationship that exists between Michael and Victoria cannot stand.

---

<sup>5</sup> This case does not involve a situation in which no father is willing to support a child. Here both fathers offer support to Victoria. The validity of a conclusive presumption of paternity in a husband where it was the only means of guaranteeing support for the child might be sustained as serving a compelling state interest. However, this statute offers the husband a way of opting out of this responsibility while excluding biological fathers who wish to support their children.

## ARGUMENT

### I. The Application of Evidence Code Section 621 To Terminate Completely Any Ongoing Relationship Between Appellants Michael and Victoria Denied Appellants Due Process of Law

#### A. Appellants Have A Fundamental Right To Maintain Their Parent-Child Relationship

This Court's decisions have recognized that the parent-child relationship -- even in a non-traditional context -- implicates fundamental interests worthy of special protection from state interference. Stanley v. Illinois, 405 U.S. 645 (1972) (rights of unwed father not to be deprived of his children after death of mother). See also Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

In Stanley, this Court struck down

as violative of due process an Illinois statute that deprived an unwed father of custody of his biological children by defining the term "parent" to include only the mother of a child born out-of-wedlock. This Court described the fundamental interests at stake in the following terms:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

405 U.S. at 651 (citations omitted). See also Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Santosky v. Kramer, 455 U.S. 745, 757 (1982) ("Freedom of choice in matters

of family life is a fundamental liberty interest.") Thus, as this Court recently confirmed in an analogous context,

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.

Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984).

Outside the marital context, however, "parental rights do not spring full-blown from the biological connection between parent and child," Lehr v. Robertson, 463 U.S. at 260, quoting Caban v. Mohammed, 441 U.S. at 397, but rather require demonstration of the "full commitment to the responsibilities of parenthood." Lehr, 463 U.S. at 261. See also Quilloin v. Walcott, 434 U.S. at

256. In determining the strength of an asserted constitutional liberty interest to be protected in the non-marital context, this Court has therefore focused on whether the biological parent has developed a substantial relationship with the child. Thus, a biological father who lacks any significant custodial, personal or financial relationship with his child cannot belatedly claim a right to establish such a relationship years after the childbirth. Lehr v. Robertson, 463 U.S. at 262.

Here, Michael is not only the natural father of Victoria but also has contributed to her well-being and growth. Both as a custodial and non-custodial parent, Michael has shown love and affection for his daughter; he has participated in decisions affecting her

development and welfare; and he has contributed financially to her support. Victoria, in turn, has come to regard Michael as a father she loves, a person whose continued affection and attention are essential to her growth and stability. Appellants' interest in continuing this critical relationship is thus based on biological connection as well as affective bonds that have developed over time. Appellants assert a right to continue to play an important role in each other's life: They are connected through biology, emotion and mutual support.

As this Court underscored in Lehr v. Robertson:

When an unwed father demonstrates full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child

requires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children."

463 U.S. at 261 (citation omitted). Here, Michael's nurturing activities during the important, early years of Victoria's life, combined with his readiness to provide financial support, demonstrate a "full commitment to the responsibilities of parenthood" that this Court has found critical in according constitutional protection to the parent-child relationship. That this relationship occurs outside the traditional marital context does not extinguish the liberty interests at stake. To the contrary, this Court's decisions recognize the fundamental right of a child to maintain a relationship with his or her natural father in situations departing from the

traditional nuclear model. As the Court observed in Stanley:

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bounds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit.

405 U.S. at 651-52, citing Levy v. Louisiana, 391 U.S. 68 (1968). See also, Santosky v. Kramer, 455 U.S. at 754 n. 7 ("The fact that important liberty interests of the child ... may also be affected..."); Rotary International v. Rotary Club of Duarte, 107 S.Ct. 1940, 1946 (1987) ("We have not held that constitutional protection is restricted to relationships among family

members..."). Similarly, this Court has recognized that an unwed father who engages in regular visitation with a biological child "may have a relationship with his children fully comparable to that of the mother." Caban v. Mohammed, 441 U.S. at 389.

In Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983), the Court of Appeals stressed the reciprocal and mutually reinforcing interests of a non-custodial parent and his children in continuing a parent-child relationship after this relationship was terminated by virtue of the federal witness protection program. The Franz Court's description of these interests is especially pertinent to this case:

...a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich

and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him in being raised by a loving, responsible, reliable adult.

\* \* \*

Moreover, there is considerable evidence that the emotional stability of children of divorced parents is often tied to the quality of their continuing relationships with their non-custodial parent. On this point, in short, it appears impossible to say with any confidence that the concerns that underlie our willingness to accord "fundamental" status to parent-child bonds are any less telling when the relationship in question consists of mere "visitation."

Id. at 599, 601. This general observation in Franz is affirmed in this case by the expert's opinion that Victoria's interests would be best served by continuing her relationship with

Michael through regular visitation. Jur. St., at 13 n.2.

These principles confirm that appellants' interests in sustaining their parent-child relationship are fundamental and thus come before the Court with the same "momentum for respect" recognized in Stanley and Caban. Unlike Lehr or Quilloin, where the biological fathers made little, if any, effort to offer emotional or financial support to their children, Michael has consistently provided Victoria with sustenance and care. Where the father had only an "inchoate relationship with a child whom he has never supported and rarely seen," Lehr, 463 U.S. at 249, this Court found no constitutional bar to allowing adoption of the children by men who evidenced willingness to accept parental

responsibility.

In Quilloin the biological father visited the child on "many occasions" and provided gifts "from time to time" but provided support only on an irregular basis. 434 U.S. at 251. Significantly, the trial court in Quilloin made a finding after a hearing that the proposed adoption and severance of the biological father's legitimation and visitation rights was in the child's best interests. Id.

The record here, by contrast, shows an intensity and commitment in the relationship between Michael and Victoria, recognized by a court appointed expert: Michael was found to be "the single adult in Victoria's life most committed to caring for her needs on a long-term basis...." Jur. St., at 13, n.2. Michael has held himself out to

Victoria as a father and has provided and offered his daughter financial support for the rest of her life. They have developed a caring relationship over time with all the attributes of parent-child love. The trial court's automatic application of Evidence Code § 621 has thwarted Michael's prodigious efforts to maintain this relationship with a daughter who loves him and needs his attention and care.

Not surprisingly, Victoria, through her guardian, seeks to maintain her relationship with Michael. This is not a merely theoretical claim founded on economic need. Victoria's guardian has asserted this position based on the expert's finding that it is in Victoria's best interests to maintain the affective bond she has developed with her biological father. This recommendation

is based on the observation of Victoria's actual interactions with Michael--interactions which provide "warmth and comfort" to both of them. Jur. St., at 13, n.2.

Genuine, loving bonds between parents and children are precisely the kind of relationship to which this Court has accorded the highest level of protection. The bond between Michael and Victoria is especially deserving of their protection.

**B. The Asserted Interests Supporting the Conclusive Presumption in Evidence Code Section 621 Are Insufficient To Justify The Termination of Appellants' Parent-Child Relationship**

In this case Evidence Code § 621 was found by the California courts to require the termination of any continuing relationship between Michael and

Victoria.<sup>6</sup> The lower courts found that the state interest in preserving the family unit of Gerald, Carole and Victoria outweighed the interests of appellants in continuing their relationship, even through visitation rights alone.

The California Court of Appeal acknowledged that Michael's interests in these circumstances were "substantial," Jur. St., at B15, and that he had established an "affectional relationship with Victoria almost since her birth." Jur. St., at B16. Nevertheless, the Court of Appeal determined that "the state's interest in preserving the integrity of the matrimonial family is so

---

<sup>6</sup> The conclusive presumption in § 621 was found to apply based on evidence adduced by Gerald and Carole that they were cohabiting at the time of Victoria's conception and birth and that Gerald was not impotent or sterile. See § 621(a).

significant that it outweighs most other interests." Id. at B16. Moreover, the court held that Michael's "private interest in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child." citing Michelle W. v. Ronald W., 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986). Id. at B17. Any interests Victoria had in continuing her relationship with Michael were found to be overridden by this same state interest. Id. at B17-18.<sup>7</sup>

---

<sup>7</sup> The Court of Appeal also found that the state interest in protecting Victoria from being branded as "illegitimate" also supports the statute. Id. at B18. In light of this Court's decisions in this area this argument cannot sustain the infringement of appellants' substantial interests. Levy v. Louisiana, supra; see also, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly

The state may indeed have a legitimate interest in protecting families that conform to the traditional nuclear model. Stanley, 405 U.S. at 652. This interest, however, would not bar a biological father from visiting a child after divorce has dissolved a marital unit. A biological father in the non-marital context has a similar constitutionally-protected right to maintain a relationship with his child. This fundamental liberty interest cannot be overridden by the state's mere assertion that children are best protected within the sanctity of marriage. Indeed, Evidence Code § 621 does not even promote that state goal. To the contrary, by permitting the marital father to escape his support obligation

---

or indirectly, give them effect.")

by disclaiming paternity within two years of the birth of the child, the statute gives no assurance that the mother's marriage will create a permanent and stable environment for the child. At the same time, a biological father who wishes to love and support his child, while respecting the mother's marital union, is prevented from doing so unless the mother joins in the motion under § 621(d).

The state's interest in giving an absolute and exclusive preference for the "matrimonial family" is also compromised where, as here, the statute works to the detriment of the child. The effect of § 621 is to deprive Victoria of an important, sustaining relationship with Michael -- a relationship regarded by her guardian to be in the child's best interests. This Court has repeatedly

protected the best interests of the child, whether the decision has been in favor of the biological parent -- as in Stanley and Caban -- or against the biological parent -- as in Lehr and Quilloin. In this case, by contrast, the California courts simply ignored the best interests of the child -- indeed § 621 does not even permit the child, through a guardian, to adjudicate paternity, demand support, or claim rights of visitation. Absent from the decision below is any indication that Victoria sought to continue her relationship with Michael, through visitation, even without an adjudication of paternity under § 621. Victoria's claim for continued visitation under this provision was clearly before the California courts yet was ignored altogether in the proceedings below.

C. The Irrebuttable Presumption in § 621 Cannot Be Sustained As A Constitutionally Appropriate Means of Effectuating Any State Interest In The "Integrity of the Matrimonial Family"

Even if the state's interest in the "integrity of the matrimonial family" may in certain circumstances overcome a natural father's claim to a continued parent-child relationship, the use of an irrebuttable presumption to further this interest is constitutionally defective. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639, 643-647 (1979); Weinberger v. Salfi, 422 U.S. 749 (1975); U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441, 446-453 (1973); Stanley v. Illinois, 405 U.S. at 649-658; Bell v. Burson, 402 U.S. 539 (1971).

This case is a perfect illustration of the vices of irrebuttable

presumptions. See generally, Tribe, American Constitutional Law (2d ed., 1988) at 1618-25. Though the protection of the traditional family unit is an important state interest, the weight to be accorded to this interest in any given situation varies with the strength of the countervailing individual interests. The conclusive presumption in § 621 avoids these mandatory constitutional balances by giving an absolute preference to parents in a family unit sanctified by a marriage contract.

The individual interests affected in these circumstances, however, are too fundamental to be resolved by conclusive presumption. U.S. Department of Agriculture v. Murry, 413 U.S. at 518-19 (Marshall, J., concurring) (The Constitution sometimes "requires the Government to act on an individualized

basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices").

In considering the constitutionality of irrebuttable presumptions, this Court has recognized a clear distinction between statutes "regulating purely economic matters," Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), and those affecting interests which enjoy "constitutionally protected status." Weinberger v. Salfi, 422 U.S. 749, 772 (1975). Where fundamental interests are at stake, the use of conclusive presumptions continues to be constitutionally suspect. See Franz v. United States, 707 F.2d at 606 n.102 ("The Court has made clear however, that [the irrebuttable presumption] doctrine remains viable when fundamental rights are at stake").

In Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (per curiam), the Court struck down a provision of Utah law which makes pregnant women ineligible for employment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth. The statute's "incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid...." Id. at 46.

Evidence Code § 621, as applied, creates an irrebuttable presumption against an unwed father in an area that clearly implicates the constitutionally protected right of "freedom of personal choice in matters of family life," Santosky, 455 U.S. at 753. It is, of course, easier for the state to make

paternity determinations by means of a conclusive presumption.<sup>8</sup> As this Court emphasized, however, in Stanley v. Illinois, supra:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

405 U.S. at 656. See also Vlandis v. Kline, 412 U.S. 441, 451 (1979).

This Court has upheld irrebuttable presumptions in commercial contexts, see Weinberger v. Salfi, 422 U.S. at 749 (1975). It has not done so, however,

---

<sup>8</sup> Evidence Code § 621 allows the mother and her husband an individualized opportunity to adjudicate paternity, while denying the biological father and child a comparable opportunity.

where the irrebuttable presumption curtailed "important liberties cognizable under the Constitution." Id. at 785. The liberties asserted by Michael and Victoria in this case are precisely the kind of fundamental rights which this Court has found too important to be curtailed by irrebuttable presumptions. The state lacks any basis for assuming that in all cases the best interests of a child will be served by barring contact with a biological father with whom a warm and loving relationship has already been established. Appellants should be free to convince the trial court that Michael has demonstrated commitment to parental responsibilities on behalf of Victoria, and that it is in Victoria's best interests to maintain a parental relationship with the biological father whom she loves.

### CONCLUSION

For the above-stated reasons, California Evidence Code § 621 should be found unconstitutional as applied in the circumstances of this case. Appellants should be permitted to maintain their parent-child relationship on such terms as the trial court determines are in Victoria's best interests.

DATED: May 5, 1988

Respectfully submitted,

JOHN A. POWELL  
HELEN HERSHKOFF  
STEVEN R. SHAPIRO  
ISABELLE KATZ PINZLER  
American Civil  
Liberties Union  
Foundation  
132 W. 43rd Street  
New York, NY 10036  
(212) 944-9800

PAUL HOFFMAN  
(Counsel of Record)  
STEPHANIE ROSS  
JOAN HOWARTH  
GARY WILLIAMS  
PATRICIA ERICKSON  
ACLU Foundation of  
Southern California  
633 So. Shatto Pl.  
Los Angeles, CA  
90005  
(213) 487-1720

## APPENDIX

## APPENDIX

California Evidence Code § 521

provides:

- (a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be child of the marriage.
- (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
- (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
- (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit

with the court acknowledging paternity of the child.

- (e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.
- (f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.
- (g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.